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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re NICHOLSON AND SONS' APPLICATION.

In re BASS, RATCLIFF AND GRETTON'S TRADE MARK.

[1929. N. 1590.]

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FARWELL J.
April 7, 8, 9, 10, 11, 29, 30;
May 1, 2.
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Nov. 18, 19, 20, 21;
Dec. 2, 3, 4, 5.
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Jan. 23;
Feb. 16.

Trade Mark—Old Mark—Registration—Distinctive Mark used before August 13, 1875—*User as Trade Mark—Similar Mark already on Register—Registration calculated to deceive—Honest concurrent User—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 11, 19, 21—*Trade Marks Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *s.* 7; *Sch. II.*

From 1865 onwards the applicants Nicholson & Sons, brewers of Maidenhead, had stencilled an outline triangle with "N" inside on their "best pale ale" casks and also branded "Nicholson" thereon. In 1927 they applied to register the combination as a trade mark. Their application was opposed by Messrs. Bass on account of the similarity of the outline triangle to the well known Bass solid triangle trade mark registered in 1876, but the Assistant Comptroller allowed the registration, limiting the outline triangle and "N" to the colours white or black. About the same time the applicants applied to remove the word "Triangle," registered by Messrs. Bass in 1926, from the Register, and the Assistant Comptroller ordered the removal.

On appeal by Messrs. Bass to Farwell J.:—

Held, (1.) The applicants had used their mark exclusively as a quality mark and never as a mark of origin or trade mark, nor was it ever recognized by the public as such. The applicants could not therefore register

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it as an old mark under ss. 9, 19, or in virtue of honest concurrent user under s. 21 of the Trade Marks Act, 1905.

(2.) Having regard to the well known Bass triangle the applicants' mark was calculated to deceive, and notwithstanding ss. 9, 19, 21, its registration was absolutely forbidden by s. 11.

(3.) The Assistant Comptroller's decisions must therefore be reversed.

On appeal by the applicants to the Court of Appeal:

Held, by Lawrence and Romer L.JJ. (Lord Hanworth M.R. dissenting)

(1.) The applicants' mark had been used both as a quality mark and a mark of origin or trade mark before August 13, 1875, and was therefore registrable as an old mark.

(2.) It was not on the evidence calculated to deceive, and in any case s. 11 could not override the express provisions of ss. 9, 19, 21. [On this point Lord Hanworth M.R. expressed no opinion.]

(3.) In the case of a distinctive mark like the applicants', non-recognition by the public is immaterial on the question of "user as a trade mark."

Dictum of Lord Esher M.R. in *Richards* v. *Butcher* [1891] 2 Ch. 522, 543, as to the necessity of public recognition, doubted.

On a subsequent application by Messrs. Bass the Court of Appeal (Lord Hanworth M.R. dissenting) refused to restrict the user by Nicholson & Sons of their trade mark to user on barrels and casks.

THE applicants Nicholson & Sons, Ld., who were brewers carrying on business at Maidenhead, applied to register as a trade mark a mark consisting of an equilateral outline triangle broken at the corners with "N" in the centre and the name "Nicholson" underneath.

The respondents Bass, Ratcliff & Gretton, Ld. (hereinafter referred to as Messrs. Bass), the well known brewers, opposed that application.

The Assistant Comptroller decided in the applicants' favour, and directed their mark to be registered, but limited the triangle and "N" to the colour white or black.

About the same time the applicants applied to have the register rectified by the removal of the word "Triangle" registered by Messrs. Bass as a trade mark in 1926. That application was also successful, and the Assistant Comptroller made the order for rectification. Messrs. Bass thereupon moved the Court to reverse both these orders.

The relevant facts were not seriously in dispute. Messrs. Bass, established as brewers in Burton-on-Trent in 1777, had continued their trade there to the present time, and had now three breweries there. Their business was now very large. About 25 per cent. was export trade. In 1855 they adopted as a trade mark a label consisting of a solid equilateral red triangle. The label had "Bass & Co.'s Pale Ale" round it and "Bass & Co." underneath. Notice of this label as a distinguishing mark of Bass's Pale Ale was given to their customers and others by a circular of February, 1855.

In 1876 Messrs. Bass registered the above label as a trade mark for pale ale. They also registered a simple solid triangle as a trade mark for pale ale. They used those two trade marks from 1855 to the present day, and before the recent order no other triangle mark for beer had been placed on the register.

An attempt to register such a mark was made by Messrs. Worthington in 1879, but it failed: see *In re Worthington & Co.'s Trade-Mark.* (1)

On March 24, 1883, Messrs. Bass registered a solid triangle for beer. The original colour was red, and they used the red triangle on their bottled beer. They did not however confine the colour to red. In 1915 they adopted a purple triangle for bottled beer specially suitable for export to hot climates, and recently they had adopted a blue triangle for bottled beer specially suitable for racecourses and shows. They also placed a small red, white or blue triangle on their bottles to distinguish their three breweries, the Old, the Middle, and the New, so that their customers could choose their particular brewery, and by posters, advertisements and other means they had brought their triangle mark prominently before the public.

In 1919 Messrs. Bass became aware that the applicants were using a triangle in connection with their beer. Certain correspondence took place between 1919 and 1922 with a view to limiting the applicants' user to a quality mark, but no agreement was arrived at.

In March, 1926, Messrs. Bass registered the word "Triangle" as a trade mark for beer in class 43 to be associated with their other marks.

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(1) (1880) 14 Ch. D. 8.

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On the other hand, the applicants Nicholson & Sons were established as brewers in Maidenhead in 1840, and did a very considerable business in the immediate neighbourhood. They made various qualities of beer, and placed on their casks signs or marks to distinguish those qualities. They marked their best pale ale with an outline triangle chalked on the end of the barrel, and also branded "Nicholson" on the barrel. In 1865 they substituted stencil marks with the letters "B B" or "X X," and they had a stencil made of an outline triangle with "N" inside. These marks were stencilled with whiting on the end of the barrels to indicate the quality of the beer, the barrels being previously branded "Nicholson" and sometimes "Maidenhead" as well. The object of the branding was to secure the return of the barrel, and the stencil mark was to indicate the quality of the beer.

It was not usual with brewers to put their trade mark on their barrels, though Messrs. Bass did so, but as a rule brewers did not use their trade marks as quality marks on barrels.

The outline triangle with "N" inside was peculiar to the applicants. No other brewer used it, and to that extent it was a distinctive mark for the purpose of indicating the quality of the beer in their barrel. It was not a permanent marking, but was changed if some other quality of beer was put in the barrel.

In 1922 the applicants registered the picture of a soldier mounted on a camel in class 43 as a trade mark for bitter ale, and used it as a trade mark on their bottled beer.

After the abortive correspondence between the parties, ending early in 1922, nothing further was done on either side. Messrs. Bass did not interfere with the sort of user that the applicants were making of their outline triangle mark. The applicants on the other hand did not attempt to register it as a trade mark.

But when in 1926 Messrs. Bass registered the word "Triangle" as a trade mark the applicants applied to register their own mark, which they said they had used as a trade mark from a very early date. Their first application on October 29, 1926, was to register a triangle without the central "N." This was a mistake of the solicitors. On December 30, 1926, on the applicants' instructions the application asked for a broken outline triangle with the central "N." But when the matter came before the Registrar and he saw the word "Nicholson" also on the barrel, he thought that the application ought to include that name, and on November 5, 1927, it was re-amended accordingly.

On October 29, 1926, the applicants applied to remove Bass's word "Triangle" from the register. That application stood over until the first application had been put in order, and consequent amendments were made on the second application on March 29, 1928.

Messrs. Bass opposed both applications, but on August 14, 1929, the Assistant Comptroller decided against them, whereupon Messrs. Bass appealed to the Court.

Sir Duncan Kerly K.C. and *R. E. Burrell* for Messrs. Bass.

Trevor Watson K.C. and *Kenneth Swan* for the applicants.

FARWELL J. [after stating the facts and pointing out that in their correspondence with Messrs. Bass the applicants were merely seeking to preserve their right to use their triangle or "N" triangle as a quality mark on their barrels, price lists and invoices as theretofore, and never suggested that the outline triangle with "N" inside was a trade mark or part of a trade mark which they intended to register, continued :] I am completely satisfied on the evidence that the word "Triangle" and the symbol of a triangle used in connection with beer means to the general public Bass and nothing else. The evidence is really conclusive on that point and only what one would expect, seeing that from 1876 to the present time no other triangle mark in connection with beer has been put on the register, nor has any other triangle ever been used at all in connection with beer, except by the applicants. A triangle, both as a word and a symbol, has become so closely associated with Bass's beer that triangle

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and beer together suggest to the ordinary member of the public Bass and nothing else.

Now that trade mark being of great importance and value to Messrs. Bass they are of course apprehensive that any other triangle upon the register may lead to confusion and deception, and in order to protect their rights they resist the registration of the applicants' mark.

The applicants claim registration mainly on the ground that their mark is an old mark—namely, a mark used as a trade mark before August 13, 1875. Further, they say that their mark has been used honestly and concurrently with the Bass mark for so long a period that in order to protect their interests their mark ought to be registered with or without conditions, as the Court thinks fit. The Assistant Comptroller has put the mark on the register with limitations as to colour.

I must now refer to a few sections of the Trade Marks Act, 1905, as amended by the 1919 Act. I do not propose to deal with them at any length, because in my view the matter is really a question of fact, and I shall not be called on to decide some of the interesting and difficult questions argued. I do not propose to decide more than is necessary to determine the rights of the parties here.

Sect. 3 of the 1905 Act defines a trade mark as "a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale."

There has been much discussion whether the words "used or proposed to be used" refer to user by the applicant for the mark. It is plain they do. The phrase "proposed to be used" obviously refers to a new mark, not used in the past, and which the applicant says he proposes to use in the future. It is plain that where a person is applying to register a mark used in the past the word "used" means used by the applicant.

I am not going to deal with s. 9 at any length, but it states the essential particulars that must be found in a registrable trade mark. Para. 5 as amended by the 1919 Act states :—

"Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions of the above paragraphs (1.), (2.), (3.) and (4.), shall not be registrable under the provisions of this paragraph, except upon evidence of its distinctiveness.

"Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before August 13, 1875, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration, shall be registrable as a trade mark under this Act."

Messrs. Bass contend that the above proviso limits s. 19 (infra), and therefore this mark being a combination of a name and a device cannot be registered even as an old mark. They rely on *In re Wright, Crossley & Co.'s Application.* (1) The applicants, on the other hand say that the proviso is an enabling proviso, enabling a mark, not otherwise complying with s. 9, to be registered, if it is an old mark. In the view I take of the case it is unnecessary for me to determine that interesting question.

Sect. 11 provides that: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design."

That section contains a direct prohibition against registering a mark calculated to deceive. An application to register such a mark must be refused. If s. 11 applies it is impossible to proceed with the application either under s. 19 or any other section. The words "calculated to deceive" are wide, and in no sense confined to "calculated to deceive as between one trader and another." The mark proposed for registration may contain something "calculated to deceive the public" into thinking that the goods are something they are not. That would be a ground of refusal. But the words "calculated to deceive" also apply to the case of confusion between the proposed mark and the goods or marks of other traders, and are not confined to a comparison between the proposed mark and other people's marks. The Court must consider whether the proposed mark when in use will tend to confusion or deception between the goods of the person using the mark and other persons' goods. If yea, the Court must refuse registration.

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(1) [1900] 2 Ch. 218, 226.

In the present case there is a serious risk of deception if the applicants' mark is registered. The applicants point out that although this mark has been placed on their barrels since 1865 there has been no evidence of confusion, and therefore there will be none in future. That is an unsound contention. In the first place the applicants have only used the mark by stencilling the triangle and the "N" on the barrels, and branding "Nicholson" on them separately and to some extent for a different purpose. They have made no other use of this particular mark, or made any attempt to bring it to public notice. They use the camel mark on their bottled beer, and the public's opportunities to become familiar with the outline triangle mark have been extremely small. [His Lordship then dealt with some suggested opportunities such as the delivery of stencilled barrels on open drays, exhibition of stencilled barrels at a Brewery Exhibition, and the use of stencilled barrels in about 10 per cent. of the applicants' tied houses, all of which opportunities he considered very limited and ineffectual. His Lordship continued :] It must be remembered that this mark only appears on the applicants' best quality beer. Many people acquainted with the trade would take it as a quality mark and not necessarily a mark of origin at all. I do not think that the lack of evidence of any past confusion negatives confusion in the future.

If the applicants proceed by posters or advertisements to bring this mark to public notice, or if they elect to bottle the particular bitter beer, the barrels of which have been stencilled, and to use this mark on the bottles, there will be a serious risk of confusion. It is common practice for bottlers to put their own name under the brewer's trade mark, and any one seeing the proposed triangle on a bottle might well think it was an unfamiliar brand of Bass bottled by the applicants.

Apart from that, it is obvious that in the past the applicants have used in their price lists and invoices a plain triangle, or sometimes a triangle with an "N" inside as a mark of quality to indicate this particular class of beer, and persons ordering that beer have used that device in their orders. It is plain therefore that if the mark becomes extended in use it will become known as the triangle mark or a triangle mark, and the moment you get a mark other than Bass referred to as a triangle mark confusion is inevitable. On these grounds this mark is calculated to deceive.

As this case may go elsewhere, I ought to deal with it shortly on the hypothesis that I am wrong in my conclusion on s. 11. On that hypothesis the applicants must satisfy me that they come within the exception of s. 19, which provides that: "Except by order of the Court or in the case of trade marks in use before August 13, 1875, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive."

The words "Except by order of the Court" refer to s. 21, which, as amended, provides that "In case of honest concurrent user or of other special circumstances which, in the opinion of the Court or Registrar, make it proper so to do, the Court or Registrar may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor subject to such conditions and limitations, if any, as to mode or place of user or otherwise as the Court or the Registrar, as the case may be, may think it right to impose."

Now here the proposed mark so nearly resembles the Bass mark as to be calculated to deceive. The two marks are so sufficiently alike that there is an appreciable risk of confusion. That being so the applicants' mark cannot be registered unless they satisfy me that it is an old mark, i.e., a mark used as a trade mark before August 13, 1875, or that there has been such honest concurrent user of the mark as a trade mark as to justify me in directing registration with or without conditions.

Now the evidence satisfies me that this mark has not been used by the applicants or accepted or recognized by the public as a trade mark at all. Up to a very recent date the applicants used it as a quality mark only. All the facts point in that direction. It was only a mark placed on a barrel containing a particular quality of beer, the stencilling being removed when other beer was put in the barrel. No effort was made to bring it to public notice, except perhaps on the few occasions when the barrel was exhibited in a bar. The mark sought to be registered is the combination of the device and the name "Nicholson." I am not satisfied that that combination, even if ever used as a quality mark, was ever used as a trade mark at all. The word "Nicholson" was placed on the barrel not to show the origin of the beer but to show the ownership of the barrel. Even if I could bring myself to think, which I cannot think, that the triangle with "N" inside had been placed on the barrel to indicate both quality and origin, still the combined mark was never used as a trade mark.

W. R. Nicholson swore that the mark was used as a trade mark. But as he admitted that he knew nothing about trade marks and thought that "quality mark" meant a trade mark, I cannot place much reliance upon that piece of evidence. The mark was never used as a trade mark or recognized by the public as such. The applicants' evidence is largely composed of their tied tenants' declarations. That is of no weight as regards public recognition as a mark of origin. A few other people had recognized the triangle with the "N" inside, but not I think the composite mark, as a mark of origin. But that is wholly insufficient to discharge the applicants' onus of proving affirmatively that this mark has been used as a mark of origin. They have failed to discharge that onus.

In coming to the conclusion as to the non-recognition by the public of this mark as a mark of origin I am in no way influenced by the fact that the applicants' trade area is very circumscribed. If I were satisfied that the public in that circumscribed area had come to recognize the mark as a mark of origin I should have held that the onus was discharged. But I am not so satisfied. In these circumstances I must refuse registration both under ss. 11 and 19. The Assistant Comptroller came to a wrong conclusion in directing the registration to proceed, and I do not think that his limitation afforded the smallest protection to Messrs. Bass. It follows that the application to rectify must also fail. The word "Triangle" or the symbol of a triangle in connection with beer means Bass, and the Bass triangle is the only triangle mark used as a trade mark for beer since 1855. The word "Triangle" must therefore be restored to the register.

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The applicants appealed. The appeals were heard on November 18, 19, 20, 21; December 2, 3, 4, 5, 1930; and January 23, 1931.

Trevor Watson K.C. and *Kenneth Swan* for the appellants. The appellants are entitled to register their mark under s. 9 of the Trade Marks Act, 1905, as amended by s. 7 of the Trade Marks Act, 1919, as a distinctive device. The mark is also registrable under the proviso to s. 9 as having been in use since before August 13, 1875. The respondents rely, however, on s. 19 of the Act of 1905, which prevents registration of a mark which so nearly resembles a registered mark belonging to a different proprietor with regard to the same class of goods as to be calculated to deceive, except in the case of trade marks in use before 1875 or by order of the

Court. This section does not prevent the applicants from obtaining registration, because (1.) on the evidence the applicants' mark does not in fact so closely resemble the respondents' mark as to be calculated to deceive, and (2.) the mark has been in use since before 1875. Then it is said by the respondents that if s. 19 does not prevent registration of the appellants' mark s. 11 does. Here again there are two answers : First, the mark is not in fact calculated to deceive ; and, secondly, even if it were, it would be entitled to registration under s. 21, which enables the Court to permit registration of a nearly identical mark where there has been honest concurrent user.

It is scarcely contested that if in fact the appellants' mark was used as a trade mark before August, 1875, they would be entitled to have it registered. The main controversy in this case is whether the appellants' early user was user as a trade mark, and the respondents contend that it was used merely as a quality mark. If a mark is used for a particular branch of a trader's trade the use will probably be as a quality mark, but if it is used by a trader on his goods and has become well known as his trade mark, the user is as a trade mark. It is said that the appellants intended to use their mark as a quality mark to show that the beer in particular casks was bitter beer. Intention, however, has nothing to do with the matter. The question is what is the quality of the user ? If the user and the mark are of a kind to indicate origin as well as quality, then the mark is being used as a trade mark. If the mark is used by one trader alone, and it is not used in the trade generally, then it cannot be a quality mark. It was also said that this mark was put on where one would expect to find a quality mark—namely, on the outside of the casks containing Nicholsons' bitter beer, and that it is used in a stencil which is common in the case of a quality mark. The answer is that this bitter beer is the only beer sold by Nicholsons which they never bottled, and therefore that the only way in which its origin could be brought home to the public was by a mark on the barrel. Messrs. Bass's mark is just as much a quality mark as

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Nicholsons'. The use of a triangle as meaning Nicholsons' beer is very fully proved, and there is no such body of evidence, in regard to Bass's user. The appellants are therefore entitled to protection. Until 1926 the respondents were educating the public to call their beer Bass, while the appellants have always encouraged the use of a triangle in application to their beer.

It is true that an appeal against the registration of a mark lies from the Registrar to the Court, but unless he has clearly gone wrong his discretion ought not to be interfered with by the Court: *In re Reddaway & Co.'s Application* (1); *In re McDowell's Application* (2); *In re Crompton & Co.'s Trade-Mark.* (3) Here the appellants have the decision of the Assistant Comptroller in their favour.

As to what constitutes a quality mark see *John H. Andrew & Co., Ld.* v. *Kuehnrich* (4); *J. B. Stone & Co., Ld.* v. *Steelace Manufacturing Co.* (5)

It is alleged that the intention of the proprietor of the mark is the determining factor, and that Nicholson's intended that their mark should be used as a mark of quality and not as a mark of origin. But it is submitted that it is not what the proprietor of the mark intended by putting the mark on his goods, but what the public understood it to mean that is material: *In re Spencer's Trade Marks* (6); *In re Crompton & Co.'s Trade Mark* (3); *In re Wright, Crossley & Co.'s Application* (7); *In re Heddle & Co.'s Application* (8); *In re Palmer's Trade-Mark* (9); *In re Barrows' Trade-Marks.* (10) These cases show that the question is: what does the mark mean in the market? It is admitted that Lord Esher does say in *Richards* v. *Butcher* (11) that the intention with which the proprietor put his mark on his goods

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(1) (1926) 44 Rep. Pat. Cas. 27, 36; [1927] W. N. 5.

(2) (1927) 44 Rep. Pat. Cas. 335, 341.

(3) [1902] 1 Ch. 758.

(4) (1913) 30 Rep. Pat. Cas. 677, 688.

(5) (1929) 46 Rep. Pat. Cas. 192; Ibid. 406.

(6) (1886) 3 Rep. Pat. Cas. 73.

(7) [1900] 2 Ch. 218.

(8) (1903) 20 Rep. Pat. Cas. 599.

(9) (1883) 24 Ch. D. 504.

(10) (1877) 5 Ch. D. 353.

(11) [1891] 2 Ch. 522, 543.

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was a material consideration, but that it is submitted was obiter.

It is alleged that the appellants put the word "Nicholson" on their casks in order to get them back, but that is not the result of the evidence.

Farwell J. has taken the view that the question here is whether the mark sought to be registered is calculated to deceive. It is submitted, however, that whether there is a liability to confusion or not if appellants have an old mark they are entitled to have it registered. They desire to adopt as part of their argument the following statement in Kerly on Trade Marks, 6th ed., p. 255: "Leave to register a second old mark is granted as of course, if an independent and honestly acquired title to the trade mark as a trade mark is shown," for which statement *In re Jelley, Son & Jones's Application* (1) is cited.

It is submitted that when the evidence in the present case is considered it will be seen that there is no reasonable probability of deception, and that the finding of the judge is against the weight of evidence. The evidence as to probability of deception was purely hypothetical. No witness ventured to say that the visual impression of the mark would be liable to deceive. The overwhelming mass of people order Bass's beer as "Bass."

It is said that if the appellants obtain registration of their mark they will be able to use it on their letter paper, etc. But registration gives no right to an extended user which would make the mark in fact calculated to deceive: *In re Lyle & Kinahan's Application.* (2) So long as the appellants keep within their trade mark they are protected by the Act of 1905, but so soon as they go outside it and cause confusion they become liable to an action for passing off under s. 45.

It is suggested that there is a possibility of confusion in written orders through customers using a symbol triangle, but there is no evidence that there has been any such confusion. The mere possibility of confusion is not sufficient: *In re*

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(1) (1878) 51 L. J. (Ch.) 639*n*.

(2) (1907) 24 Rep. Pat. Cas. 249, 257, 258, 260.

Maeder's Trade Mark Application. (1) The onus of showing there is a likelihood of confusion arising is on the opponents to registration: *In re Bagots Hutton & Co.'s Application.* (2) The looseness in the use of words by the public ought not to prejudice the appellants.

[*In re London Lubricants* (1920) *Ld.'s Application* (3); *In re Apollinaris Co.'s Application* (4) were also referred to.]

Sir Duncan Kerly K.C. and *R. E. Burrell* for the respondents. The respondents have never objected to the appellants using their mark in the old way on their barrel heads. Sect. 39 of the Trade Marks Act defines the limits of the respondents' monopoly. It is subject to the limitations of s. 41.

It is settled so far as this Court is concerned that registration only limits user as a trade mark. The respondents can interfere with this mark of 1875 provided that it has not been used as a trade mark. The appellants have the protection of s. 41 only if they bring themselves within it. No question was pleaded or raised below in regard to s. 41 of the Trade Marks Act, 1905, by the appellants. But if the respondents are right in their contention that no user by the appellants before 1875 of their "N" triangle mark as a trade mark has been proved, s. 41 can have no application, for the respondents have evidence of user of their triangle mark going back to 1855. Even up to the time when the respondents' triangle mark was registered in 1885, there is no sufficient evidence that Nicholsons had used their "N" triangle mark otherwise than as a quality mark. The appellants are really trying in their proceedings to obtain the right to use their mark more prominently and as a trade mark. Thus they claim to use it on bottles, a thing they have never hitherto done. Counsel for the appellants have denied this, but when before the Assistant Comptroller the respondents sought to have registration of the respondents' mark limited by reference to its old user on cask heads, the appellants objected, and they also refused before Farwell J. to accept such a limitation. So far back as 1880 the

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(1) [1916] 1 Ch. 304.
(2) (1916) 33 Rep. Pat. Cas. 357.
(3) (1925) 42 Rep. Pat. Cas. 264.
(4) (1890) 8 Rep. Pat. Cas. 137.

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respondents' right to their triangle mark was recognized in *In re Worthington & Co.'s Trade-Mark* (1), and it has never since been challenged.

The principles applicable in determining whether registration should be allowed of a mark resembling in shape another mark were laid down by Brett L.J. (2) in that case, and have been universally adopted: see *In re McDowell's Application* (3), where Sargant L.J. pointed out that the use of "Nuvol" by the applicant was on barrels only "to the actual users, who had dealt directly with him, know the goods as his, quite apart from any mark, and are not going to resell the goods under that mark, or at all." The same thing could be said of Nicholsons' proved user of their mark.

Two things are necessary to prove that Nicholsons used their mark as a trade mark before 1875. First, it must be shown that they intended the mark to show the origin of their goods; and, secondly, the mark must in fact be recognized as distinctive by the public: *Richards* v. *Butcher* (4); *In re Powell's Trade-Mark.* (5) It is a question of fact in each case whether both these elements have existed and from what date. Here Nicholsons' user of their mark before 1875 was on casks of bitter beer. If the mark had been intended to be used as a trade mark its user would scarcely have been so restricted. The user was as a quality mark only. Even if it were proved that the public treated it as a trade mark, that would not suffice if the proprietors never intended to use it as distinctive of their goods: see the definition of "trade mark" in s. 3 of the Trade Marks Act, 1905, which adopted the definition given by Lord Esher in *Richards* v. *Butcher.* (4) The proprietors' intention to use a mark as a trade mark is vital. The intention to use must be the intention on the part of the person seeking to use the mark himself. Here on an examination of the evidence it becomes clear that no intention on the part of Nicholsons

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(1) 14 Ch. D. 8.

(2) Ibid. 15.

(3) (1926) 43 Rep. Pat. Cas. 313, 338.

(4) [1891] 2 Ch. 522, 543.

(5) [1893] 2 Ch. 388; and in H. L. sub nom. *Powell* v. *Birmingham Vinegar Brewery Co.* [1894] A. C. 8.

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to use the mark as a trade mark is proved. In *In re Ducker's Trade Mark* (1) registration was refused because no bona fide intention of using the mark was proved.

Again the appellants are not entitled to registration of their mark, because it is rendered unlawful by s. 11 of the Act of 1905. The use of the mark would, within that section, be calculated to deceive, and Farwell J. has so held. The appellants suggest that even if that were so it is by virtue of s. 19 immaterial in the case of a mark in use before August 13, 1875. Sect. 11 is, however, an overriding provision: *In re Compagnie Industrielle des Pétroles' Application* (2); and it is only an old mark which does not offend against s. 11 that can be registered under s. 19, although it so nearly resembles an existing registered mark as to be calculated to deceive. The history of this legislation makes this clear. When registration of trade marks commenced in 1875 it was intended to put an end to actions for infringement founded on the common law, so that a trade mark proprietor should only be able to sue on his registered title. It was consequently intended that under the Trade Marks Registration Act, 1875, existing trade marks should be registered. It became necessary therefore to allow registration of identical or almost identical marks, but s. 6 provided against registration in these cases without the special leave of the Court. The section then went on to provide that "it shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a court of equity." That provision was repeated in the Patents, Designs and Trade Marks Act, 1883, s. 73, and amended by the omission of "exclusive" by the Patents, Designs and Trade Marks Act, 1888, s. 15; but in the 1905 Act it was strengthened, and became s. 11 of that Act. It is clear that s. 11, like its predecessors, must have been intended to apply to a mark in existence before 1875. It is really declaratory of the law laid down in *Eno* v. *Dunn*. (3) Sect. 19

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(1) [1929] 1 Ch. 113.
(2) [1907] 2 Ch. 435.
(3) (1890) 15 App. Cas. 252.

does not therefore except old marks from the context of s. 11.

[Lawrence L.J. How can s. 21 of the Act be reconciled with s. 11 ?]

Sect. 21 may apply when there are distinguishing circumstances apart from the actual mark, as where the concurrent user is in different parts of the country ; but s. 11 is otherwise the master section.

Further, even though the appellants succeeded in establishing that their mark was in use as a trade mark before 1875, it is not such a mark as is registrable. Amongst old marks which are registrable there have never been included devices or marks which contain as an essential feature a device. Such a mark is not within the proviso to s. 9 of the Act of 1905, so as to be registrable as an old mark, although it has none of the essential features mentioned in paras. 1 to 5 of the section : *In re Wright, Crossley & Co.'s Application.* (1)

[Romer L.J. If the proviso to s. 9 makes marks, not otherwise registrable, registrable if they are old marks, why does not s. 19 have a similar effect ?]

Under the proviso to s. 9 the mark must have been used continuously by the applicant or his predecessors in title since before 1875 without any alteration substantially affecting its identity. If s. 19 was given the wide meaning contended for by the appellants none of these special characteristics would be necessary. It will seemingly suffice for the purpose of s. 19 that the user of the mark has been by some one else or if its user has been sporadic. The mark may even have been altered substantially. That cannot be the intention. Old marks cannot be registered unless they come within s. 9 : see s. 41. It follows that s. 19 must be regarded as subordinate to s. 11.

It only remains to consider the question of fact whether the appellants' mark would, if registered, be calculated to deceive. Farwell J. held that it would, and the Assistant Comptroller was only prevented from deciding in the same sense because he did not allow the mark to be used otherwise than in black

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(1) [1900] 2 Ch. 218.

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or white. The Court has to consider not merely the result of the actual proved user but the result of any normal user of a registered mark: *In re Worthington & Co.'s Trade-Mark* (1); *In re McDowell's Application.* (2) The Assistant Comptroller has said that up to the present there has been no deception. It would be more accurate to say that there was no evidence of deception which had become known to the respondents so as to enable them to prove it. Hitherto the mark has only been used on casks, but if used on bottles it must involve deception. If, as has been shown, the triangle mark means the respondents' mark, it will not be possible to avoid deception, because the use of the appellants' mark will lead to their beer being known as " triangle " beer.

Lastly, if the respondents are right in their contention that the appellants' mark ought not to be registered, it must follow that the word " triangle " registered by the respondents in 1926 ought to remain on the register.

[They also referred to *In re Massachusetts Saw Works Application.* (3)]

Trevor Watson K.C. replied.

Cur. adv. vult.

Jan. 23. The following written judgments were delivered:—

LORD HANWORTH M.R. These appeals arise upon two applications, the first, No. 474,612, made on October 26, 1926, by Nicholson & Sons, Ld., to register in Class 43 as a trade mark in respect of bitter beer, a mark consisting of a plain open triangle. On December 30, 1926, this application was amended by asking that the mark to be registered should be a triangle broken at each angle, with the letter " N " in the middle of it. On November 5, 1927, the application was further amended, at the instance, we are told, of the Patent Office, by asking for the addition of the name " Nicholson " underneath the triangle.

To this amended application Messrs. Bass, Ratcliff & Gretton, Ld. (hereinafter referred to as " Messrs. Bass "), gave notice of opposition on March 12, 1928, on the grounds

(1) 14 Ch. D. 8.
(2) 43 Rep. Pat. Cas. 313.
(3) (1918) 35 Rep. Pat. Cas. 137.

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that they are the proprietors of a trade mark consisting of a triangle used by them on pale ale, and that the device of a triangle is regarded as indicating ale of their brewing. They set out the particulars of their registered trade marks, and the grounds of their opposition are fully stated in the report of the case before Farwell J. (1)

On March 26, 1926, Messrs. Bass registered the word "Triangle" as a trade mark for beer in Class 43, and it was registered as No. 468,320. On October 29, 1926, Messrs. Nicholson applied for rectification of the Register by deleting this word "Triangle" from it. That is the second application.

The applications were heard by the Assistant Comptroller, who gave his decision on August 14, 1929, allowing both applications. He registered Messrs. Nicholson's amended trade mark, subject to the addition of a note as follows, to be entered on the Register: "The part of the mark consisting of the triangle and the letter 'N' is limited to the colour white or the colour black." He cancelled Messrs. Bass's registration No. 468,320 of the word "Triangle." Messrs. Bass appealed from these two decisions, and their appeal was heard before Farwell J.

The applications and the opposition to them before the Assistant Comptroller were supported by a number of declarations filed by each side. Some additional evidence was adduced, and some of the declarants were called and cross-examined before Farwell J. Thus, as he points out, he was placed in a better position than was the Assistant Comptroller to determine the questions before him. On May 2, 1930, he allowed the appeal in both applications, with the result that he refused the registration of Nicholson's proposed trade mark and confirmed the registration of Messrs. Bass's mark No. 468,320. Messrs. Nicholson now appeal to this Court in respect of the decision on both applications.

The history of both Messrs. Nicholson & Sons, Ld., and of Messrs. Bass in relation to their business and their user of marks and the registration of their trade marks, and also the relevant facts, are carefully and sufficiently set out in the judgment of Farwell J. It is unnecessary to repeat them, and I will only refer to such part as is necessary to make this judgment intelligible. The main facts are not seriously in dispute. The difficulty lies, as Farwell J. has said, in determining what is the true inference to be deduced from them, and in the application of them to the system laid down by the Trade Marks Acts.

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(1) (1930) 47 Rep. Pat. Cas. 366, 368, 369.

I will deal first with Messrs. Nicholson's application to register their mark—namely, the broken triangle with "N" inside it and the name "Nicholson" below it. It is in my judgment plain upon the facts proved that if Messrs. Nicholson's application was to register a new mark—one that they were now proposing to use without any history behind it—the application must fail. It would fall within the restriction imposed by s. 11 of the Trade Marks Act, 1905, as "being calculated to deceive." The question of the inter-relation of this s. 11 with the proviso in s. 9 and ss. 19, 21 and 41, which has been discussed before us, does not arise upon the view of the proposed mark considered as a new one.

The ground on which the Assistant Comptroller gave his judgment in favour of Messrs. Nicholson's application was that he was satisfied that the mark in the form propounded had been used by the applicants and their predecessors in business continuously from a date before August 13, 1875, up to the date of the present application. It thus fell within the exception to s. 19 of the Act of 1905, and as such is registrable as being, what has been termed for short, an "old mark," though it must be noted that this term is not to be found in the Trade Marks Acts.

Farwell J. allowed the appeal, basing his decision on the ground that s. 11 was an overriding section, imposing a restriction against a mark the use of which would be "calculated to deceive": a quality which he held must be overcome before the registration of a mark, whether used ante or post 1875, can be permitted. He also dealt with the mark per se, upon the facts as well, for he stated, and I agree with him, that the problem to be solved is largely a question of fact. Indeed, when a conclusion has been reached upon the facts and the inferences from them, I think it will be found unnecessary to decide a number of the points raised upon the statutes.

In particular, I am doubtful whether I can agree with Farwell J. upon the effect to be given to s. 11. It is possible to read the Act as meaning that a pre-1875 mark is to be given a special privilege, a privilege specially reserved under s. 19, although "identical" or "so nearly resembling" "as to be calculated to deceive"; and further contemplated as existing under s. 21, and carried out logically in ss. 39 and 41. If this view were held to prevail, it may be that s. 11 must be construed as not covering pre-1875 marks at all, but as containing a note of futurity which makes it apply to new marks which are to be registered, and not to marks which have a history dating from before 1875, behind them. I am, however, leaving this point undecided, and will only mention one more point before dealing with the evidence and facts.

It is important to construe carefully the words of the exception or proviso which permit a mark used before 1875 to be registrable. It was decided that under s. 10 of the Act of 1875 a single letter, although an old mark, could not be registered, and so in the Act of 1883 "letter" was introduced into the proviso to s. 64, and continued in the Act of 1888.

Some importance seems to attach to the precise words of the section or proviso, for in *Perry Davis & Son* v. *Harbord* (1) it was held that to satisfy the section any special and distinctive word or words must have been used alone as a trade mark before the passing of the Act, and not merely in combination with other words. Thus "Pain Killer" not having been used alone before the Act, but only in association as "Perry Davis' Vegetable Pain Killer," could not be treated as an "old mark." Lord Halsbury points out that it is a question of fact how it was used. Lord Herschell (2) holds that on the true construction of the section, words have not been used as a trade mark if they have been used either in combination with other words or "in combination with any device"; in short, he adds: "they must be used alone as the trade-mark in order to be used as a trade-mark within the meaning of that section."

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(1) (1890) 15 App. Cas. 316.

(2) 15 App. Cas. 321.

Byrne J. in *In re Wright, Crossley & Co.'s Application* (1) points out that the result of this case, and indeed of other authorities, is that an "old mark" must be registered as a whole, and as it was actually used before August 13, 1875, and continuously ever since. See also *Richards* v. *Butcher*. (2)

Sir Duncan Kerly argued that the "N" inside the triangle is a device and not a letter, and so not registrable. This argument appeals to me; and although there are other matters which are sufficient to decide the case, it is clear from the above authorities that the section or proviso must be strictly complied with, and that the onus of proof to this effect lies upon the applicants. They must prove that the special or distinctive word or words, letter—combination of letters—was used, and has continued to be used, from before August 13, 1875, down to the date of the application for registration.

The proviso to s. 9 requires the mark to be distinctive; that is, adapted to distinguish the goods of Nicholson from those of any other persons.

In determining whether the suggested trade mark is so adapted, we may take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods in respect to which it is proposed to be registered, bearing in mind also that a mark used before 1875 can be registered only in respect of the goods as to which it has been used: see *In re Jelley, Son & Jones's Application*. (3)

The mark itself consists of two distinct parts, the triangle with the letter "N" inside it which was stencilled on the barrel of beer, and secondly of the name of Nicholson which was branded on the barrel for the purpose of indicating the proprietorship of Nicholson in the barrel. The brand was

(1) [1900] 2 Ch. 218, 225.

(2) [1891] 2 Ch. 522, 531.

(3) 51 L. J. (Ch.) 639*n*.

upon the end of the barrel, and the stencil mark was put upon the barrel when it had been filled with bitter ale, to which alone that mark was applicable. The stencil mark was washed off an empty cask, because that cask might not be filled again with the same beer.

The evidence does not establish to my mind that these two parts were used together as a mark " upon or in connection with goods for the purpose of indicating " that they were the goods of Messrs. Nicholson, so that they can together be held to be a combination of letters or numerals used as a trade mark by Messrs. Nicholson before August 13, 1875, which has continued to be used down to the date of the application for registration.

Let me consider the evidence of the ante 1875 period. There are not many witnesses. Mr. Frederick William Nicholson, now deceased, speaks to F.W.N.1 as being the mark which was used by his firm without alteration continuously since a date before August 13, 1875. But he points out that the mark is produced by a combination of processes —the branding of the barrel, and the stencilled triangle and " N " within it being stencilled over the name. He says : " The casks also had a serial number in addition to the name of the firm branded into the wood. All brewers' casks are branded in this way but, except in the case of new casks, the marks are not very conspicuous." Now, I have a difficulty in understanding how the firm could have been content—if this combined mark of name and device was a trade mark—to allow the name part of it to be branded only, and not added to the stencil plate, when the result of this was that the branded name became increasingly inconspicuous with wear, and the device was freshly marked when the barrel was filled. It seems to me that the device was the mark, and the name an adventitious addition to it. The witness proceeds in subsequent paragraphs to that quoted to speak of the " Triangle mark." He tells that the " Triangle mark " was first used by his " father in 1840, the founder of the business of my firm, but its use from that date cannot now be positively proved by first hand evidence farther back than 1858. . . . .

I am 78 years of age, and have known the Triangle mark from my earliest youth. . . . . I lived with my parents and was born in the house where the business was carried on. I was always about the brewery and saw all that went on. In this way I became familiar with the mark which in those days was chalked on the casks usually by the cellarman previous to their being sent out." This evidence clearly refers to the device part of the mark, and no more. The name which was always branded is not referred to. Henry John Nash entered the service of the firm in 1862. He speaks of the "Triangle mark" as used in his early years of employment. He is familiar with the "Triangle mark"; this particular form of stencilled mark came into use on casks of bitter beer soon after his entering the firm, and was used continuously without alteration during the whole of his service—that is to 1920. Again it is the stencilled mark that is definitely spoken to; the accretion of the name over which it is stencilled is mentioned, though not as a primary part of the mark. Then he refers to twenty photographs H. J. N. 2, as true representations of the way in which the "Triangle mark" has been habitually used upon the casks since the adoption of the stencil as the means of marking the casks. An examination of these photographs convinces me that the witness is right in referring to the stencil as the mark—the name is a label of the cask. It must have been difficult for any observer to treat the two as integral parts of one trade mark.

Henry Pert went to Nicholson's Brewery in 1866. His evidence is to the same effect as that of Nash. He emphasizes the stencil as the mark, and says: "The beer bearing this mark was always referred to as 'Triangle beer' by many of the firm's customers." He goes on: "Each cask also had a branded number and the name of the firm as aforesaid. These branded marks are not easily seen unless the cask stands in a strong light." It seems impossible to hold that the name was a part of the trade mark and of equal importance in it, when it was difficult to see, and was in contrast to the bright device of the stencilled triangle with "N" within it.

Richard Keeley, now seventy-four years old, tells us that he has always known Nicholson's mark of a triangle with the letter " N " in the centre. It is stencilled in white on their casks of bitter ale. " I have heard Nicholson's bitter asked for by other people by the name of ' Triangle ' and have asked for it myself by that name." It is noticeable that he makes no reference at all to the name being part of the mark.

Henry George Dean went into the service of the Nicholsons in 1872. He deposes that when he went to the firm they were using a stencil to stamp a triangle with the letter " N " on to the casks of bitter beer, and says he was perfectly familiar with this mark and the use of the stencil, and that the marking of the casks was usually the work of the cellarman and himself. He adds : " The name of the firm was also branded on the casks—viz., Nicholson. The stencils were of copper, and were made by Messrs. Norcott and Barford." He does not refer to the name as a part of the mark with which he was familiar. He does not say that when he put the stencil on he was careful to see that the name was there, and that the device was stencilled above the name. The casual way in which this witness refers to the name satisfies me that in his user of a mark, it was the stencil mark and no more that he was using to identify the goods in the barrel.

William Montague's evidence is subject to similar criticisms. The witnesses Martin and Merrick speak of the stencilled mark as identifying Nicholson's bitter ale.

The evidence of Mr. W. R. Nicholson does not and cannot go back to pre-1875 days. He was cross-examined by Sir Duncan Kerly, and I find his evidence unconvincing, if not unsatisfactory. I agree with Farwell J., who did not place much reliance upon his evidence, that " Nicholson " was not used as a trade mark.

There appears to have been a reluctance on the part of Messrs. Nicholson to claim the triangle as a trade mark. This is not surprising. In 1879 Messrs. Worthington, the brewers, proposed to register as a trade mark for beer a triangle with the representation of a church within it. This application was opposed by Messrs. Bass, who have used their well known triangle since 1855—for seventy-five years—and the case came before Sir George Jessel: *In re Worthington & Co.'s Trade-Mark.* (1) He refused to register the new triangle on the ground that it would be calculated to deceive, and that Messrs. Worthington ought to have chosen "any other shape in the world rather than that well-known triangle which distinguishes Messrs. Bass's ale." That decision was upheld in the Court of Appeal, and two judges, James and Brett L.JJ., both take note of what might become the user of the new mark if registered in the course of trade. That decision, given fifty years ago, must have been well known in the brewery trade.

Nicholsons only used the mark on barrels, not on bottles, and never in any advertisements, because they never advertised their barrels. The evidence of Mr. Nicholson as to the user of the mark is curious. In answer to Sir Duncan Kerly he said they did not claim to have used the triangle simpliciter without the "N" or "Nicholson." They claim the broken triangle with the "N" in it and as used on the barrels only. They claim the triangle broken or unbroken with the "N" inside it apart from the name word.

Two further answers may be quoted: "(Q.) Is it not true that you never thought of the combination of a triangle with the letter 'N' and the word 'Nicholson' as a trade mark until the matter came before the Registrar in this case? (A.) I would not say that. I think you are putting it a little high. I regarded the mark on the barrel as a trade mark—the triangle as used on the barrel. (Q.) Without reference to the word 'Nicholson'? (A.) I would not say that. I had not any legal knowledge. I regarded its use on the barrel as a trade mark." Farwell J.: "Is it the fact that your original idea before you made this application was that the stencil mark was the trade mark, and that the word 'Nicholson' was something else which was put on for the purpose of identifying either the barrel or the beer? (A.) Personally I was under the impression that the 'N' with the triangle would be separate as a trade mark, but I had

(1) 14 Ch. D. 8.

no knowledge of trade mark law. (Q.) But that is what you thought was the trade mark? (A.) I think that is clear." He states also that the stencilled mark was used in respect of a particular quality of Nicholson's beer. The evidence seems to support this view completely. While giving Mr. Nicholson liberty as a layman, and not drawing any adverse inference from his want of knowledge of trade mark law, his answers as to the actual user and reliance in his business upon the mark are of great importance.

After examining the evidence with care, I find such an uncertainty in the mode of using the mark as prevents the establishment of the mark now claimed as a trade mark continuously used from before, and after, 1875. The device was one which served its purpose as a mark to distinguish one quality of beer when distributed in casks, but had not any further effect. The mark now claimed has not continuous history behind it. I am not surprised therefore that when the attention of their solicitor had been called to the actual mark used, and the amended application was presented on December 30, 1926, the claim then made was for the device of the triangle with the "N" inside it and no more. The name was not suggested as part of the trade mark. Almost a year elapsed, and then in November, 1927, and at the instance of the Patent Office—not at their own—the name is claimed as a part of the trade mark. The delay—if not unwillingness—to claim the name as a part of the trade mark is in accord with the facts as I apprehend them, for it was not used, at any rate before 1875, as a part of their mark.

This view is strengthened by the correspondence which passed between Bass and Nicholson in 1920 and 1921. The mark that is there discussed is the triangle, and no more. On January 13, 1921, Mr. Nicholson writes: "With regard to the printed list, we have never used the letter 'N' in conjunction with the triangle, either in printed lists or in letters, and we cannot agree to any alteration in our user."

Treating the whole correspondence as a friendly one, the purpose of which was, if possible, to find a plan for the accommodation of both parties, and in which no conclusion was in fact reached, it nevertheless seems fair to make the following comments upon it. No claim for a mark as now claimed was made at all. The mark relied upon was not an invariable triangle with an "N" inside it. There was no insistence that it was a trade mark of established necessity to Messrs. Nicholson, but one of which the firm as at that time constituted would be ready to treat as a quality mark and not more. When Messrs. Bass in their letter of June 7, 1921, say, "The mark as used by you is not a trade mark and could not be registered as a trade mark," Messrs. Nicholson in their considered reply on June 29 agree with one exception to the terms proposed which were enclosed in the letter of June 7, and offer no repudiation of the direct statement of Messrs. Bass that the mark is not a trade mark.

The negotiations practically terminated without result in July, 1921, Messrs. Nicholson saying they desired them to come to an end, as they had "devoted as much time and trouble over this matter as is reasonable." It flickered up again in December, 1921, when the respective lawyers tried but failed to reach agreement, and finally ended on February 2, 1922.

Meantime The Trade Marks Journal of January 4, 1922, contained the notice of the registration of Nicholson's trade mark for "light bitter"—a camel with a figure of a soldier upon it. The application was stated to be dated November 26, 1920, and the user as from February 10, 1903.

The correspondence and this camel mark appear to me to be a confirmation of the view that there was not to that date any continuous user by Nicholsons of the trade mark now claimed—namely, the triangle with "N" inside it and the name of Nicholson below it—nor any great importance attached to it.

The Assistant Comptroller has felt it necessary, to avoid confusion, to impose limitations as to the colours to be used on the part of the mark that is the triangle. It seems difficult to require these conditions except upon the view that the symbol of the triangle is a separate and distinct mark apart from the name. If it were all one mark the condition ought to be applied to the mark as a whole, or at least some term imposed as to that part of it which time's effacing finger makes more difficult to decipher.

There is no objection by Messrs. Bass to Messrs. Nicholson using their mark as they did before. Whatever they have done with it for fifty-five years back to 1875 and before then can be done now.

What is the need of registration? The proviso to s. 41 appears to secure Messrs. Nicholson in the continuance of their user of the mark such as it was. It was a somewhat eclectic user. It was not used universally on all goods and letter paper and invoices as a trade mark, nor in the same form.

I come, therefore, on this part of the case to the same conclusion as Farwell J. I think the name was branded on the barrels to indicate ownership of them; and in my judgment the combined mark was never used as a trade mark, certainly never used as such before, and continuously since, August 13, 1875. Messrs. Nicholson's application to register this mark must fail.

There remains the question whether by the user, such as it was, of the device of the triangle with "N" inside it, Nicholsons are entitled to register it by virtue of ss. 19 or 21 of the Act.

From the conclusions that I have reached upon the evidence, this must be a fortuitous result arising from the fact that the device had become indicative of Nicholson's bitter ale.

There is great difficulty in allowing the device to be registered separate and apart from the name. The claim made is for the combination of the two together as having been so used. "If he uses the two together to distinguish his goods, what distinguishes his goods is the combination of the two." This remark is taken from Lord Esher's judgment in *In re Spencer's Trade Marks* (1), a case in which the Court refused registration of a mark which had never been used on goods by itself, but always in combination. Lindley L.J.

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(1) 3 Rep. Pat. Cas. 73, 74.

said that there could not be a registration of a mark which had never been used alone.

Sir Duncan Kerly argues that in order that such a right may be allowed to Messrs. Nicholson it must be established that before August 13, 1875: (*a*) the device was intended to be used as a trade mark by the owner; (*b*) that it was so understood.

The authorities cited for the first proposition are *Richards* v. *Butcher* (1); *In re Powell's Trade-Mark.* (2)

The observation of Lord Esher in *Richards* v. *Butcher* (3) appears to go the whole length in support of it, and it seems further to be carried out in the definition of trade mark; "for the purpose of indicating" should be interpreted, I think, to mean so as to serve the purpose of indicating, and in this view I respectfully share the opinion expressed by Lord Esher as to the importance of intention.

It does not seem to me possible that an owner should become possessed of a right of property such as a trade mark without conscious user on his part. The evidence to which I have called attention, and there is more besides, appears to me to establish that the user was on barrels for the purpose of identifying the liquor inside them, and that the use of the triangle otherwise in price lists or in orders is so uncertain and irregular as to prevent a conclusion that the triangle was intended to be a trade mark, or that it was used for more than a quality mark.

If a mark is descriptive, and used as such rather than as a trade mark, it ought not to be registered: see *Powell* v. *Birmingham Vinegar Brewery Co.* (4); and see also *In re Massachusetts Saw Works Application.* (5)

There is little question but that the second limb of Sir Duncan Kerly's proposition must be established—namely, that the mark was understood to mean Nicholson's beers. Here I find myself in doubt. There is evidence that in a certain area Nicholson's beer was spoken of as "triangle" beer. But in many cases that was in houses where the end of the barrel was exposed to view with both the name and the device upon it. It may be that some customers—whimsical people Mr. Swan calls them, and rightly—would call for it as "triangle" and be understood.

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(1) [1891] 2 Ch. 522.

(2) [1893] 2 Ch. 388, 393, 394, 408, 411; in H. L. sub nom. *Powell* v. *Birmingham Vinegar Brewery Co.* [1894] A. C. 8, 14, 15.

(3) [1891] 2 Ch. 522, 543.

(4) [1894] A. C. 8.

(5) (1918) 35 Rep. Pat. Cas. 137.

But I do not think that the evidence establishes that everywhere or in any house where a customer was pleased to use the term in the Maidenhead area and around it "a glass of triangle" indicated plainly a reference to Nicholson's beer. At best, I think it is not proven. Certainly it is not proved that the combined mark now asked for indicated Nicholson's beer.

Upon this part of the case it seems well to come back to the simple tests laid down by Lord Esher in *Richards* v. *Butcher* (1), and applied in many cases (for example, *In re Massachusetts Saw Works Application* (2)): "You must shew that you used it in the market for the purpose of distinguishing your goods, and, I think, you must also shew that the market accepted it as a distinguishing mark of your goods—then you use it as your 'trade-mark.'"

And if it is now suggested that the triangle with "N" separately can be registered, that seems an afterthought, inconsistent with the application for the combined mark which we have to consider. "The truth is," said Lord Esher in *Richards* v. *Butcher* (3), "that they put all those words on their goods because they meant the whole to mark their goods, and to distinguish them; and, if that is so, the whole of it was the trade-mark which they used."

For these reasons, I think the suggestion that the device can be registered also fails.

In this view there appears no objection to Messrs. Bass's registration of the word "Triangle," and thus the application to rectify the register must also fail.

In my judgment, therefore, both the appeals ought to be dismissed; but as I have the misfortune to differ from my colleagues, the order will be to allow the appeals.

(1) [1891] 2 Ch. 522, 543.
(2) (1918) 35 Rep. Pat. Cas. 137.
(3) [1891] 2 Ch. 522, 544.

LAWRENCE L.J. In my opinion, the crucial question in this case is whether the mark sought to be registered by Messrs. Nicholson was in use as a trade mark before August 13, 1875.

The material facts as to the origin and user of the mark are simple and not really in dispute.

Messrs. Nicholson are an old established firm of brewers carrying on business at Maidenhead. For at least seven years before 1865 (and probably considerably longer) Messrs. Nicholson made it their practice to chalk a mark consisting of an equilateral hollow triangle on the heads of all casks containing their best quality bitter beer before sending them out to their customers. In the year 1865 Messrs. Nicholson altered this mark by placing the letter "N" in the middle of the triangle, and instead of chalking the altered mark on the cask heads they applied it with a brush and whiting by means of a stencil. The use of a stencil necessitated the breaking of the corners of the triangle, but this feature is of no real importance, as for all practical purposes the mark as altered in 1865 (which I will call "the triangle mark") consists of a hollow triangle with the letter "N" in the middle.

All casks used in Messrs. Nicholson's brewery have the name "Nicholson" branded on the cask heads, sometimes with the addition of "Maidenhead," but generally by itself, and in practice the triangle mark, which is comparatively large, is generally placed above this name, but sometimes (for want of care or space) is wholly or partially superimposed upon it.

From the year 1865 down to the present time, that is to say, for a period of sixty-five years, the triangle mark has been continuously placed in the manner described upon all casks of whatever size containing Messrs. Nicholson's best quality bitter beer before leaving their brewery, but not on any casks containing beers of other qualities.

Messrs. Nicholson owned no tied houses before the year 1886, and until that year their trade consisted entirely of supplying their beers to private customers and to free public houses.

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It is not disputed that the triangle mark is a distinctive device and unique in the brewing trade; consequently, it is inherently adapted not only to distinguish Messrs. Nicholson's bitter beer from the other beers brewed by them, but also to distinguish that beer from the beer of other brewers. Farwell J., in his judgment, says this about it: "Now the mark, a triangle with 'N' in the middle, so far as the evidence before me goes, is peculiar to Messrs. Nicholson. So far as I am aware, there is no other brewery that uses that mark for the purpose of indicating the quality of the beer which they brew, and to that extent it is no doubt a distinctive mark for the particular quality of beer which the barrels contain."

The main contention of Messrs. Bass was that Messrs. Nicholson, by using the triangle mark in the manner which I have described, were using it not as a trade mark but as a quality mark.

There is some risk of confusing the issue in treating user as a quality mark and user as a trade mark as antithetical in the circumstances of the present case.

No doubt a symbol which by trade usage has come to denote quality and nothing else (such as, for instance, the hammer mark in the cutlery trade and the "X X" and "X X X" marks in the brewing trade) cannot be appropriated by a particular manufacturer as his trade mark any more than a common adjective denoting quality can be so appropriated. The term "quality mark," if confined to such a mark, is correctly set in contrast to the term "trade mark" as understood in this branch of the law. But in the present case we are not concerned with a quality mark which cannot serve to connect the goods on which it is used with a particular manufacturer but with a distinctive mark used exclusively by Messrs. Nicholson and by no other brewers. One of the main functions of a trade mark is to indicate the quality of the goods in connection with which it is used. There are many manufacturers who use a variety of trade marks which they apply to goods of different qualities, and such marks are "quality marks" in the wider sense of that term.

The function of a trade mark is, in my opinion, accurately described in the following passage in the late Mr. Sebastian's book on The Law of Trade Marks, 5th ed., p. 2: "The function of the trade mark is to give the purchaser a satisfactory assurance of the make and quality of the article he is buying. Thus, it was said by Lord Cottenham, C. (in *Spottiswoode* v. *Clarke* (1)), 'take a piece of steel: the mark of the manufacturer from whom it comes is the only indication to the eye of the customer of the quality of the article; so it is of blacking, or any other article of manufacture the particular quality of which is not discernible to the eye.' It is on the faith of the mark being genuine, and representing a quality equal to that which he has previously found a similar mark to indicate, that the purchaser makes his purchase."

Again, in *John H. Andrew & Co.* v. *Kuehnrich* (2) Buckley L.J. states: "I have no doubt that the marks in question were used as quality marks, but that does not necessarily exclude user as a trade mark. A man may indicate his best quality by one trade mark; his second quality by another trade mark, and so on. A mark does not necessarily cease to be a trade mark because it conveys also something further, namely, that the goods indicated as being goods of a particular maker are goods of that maker of a particular kind."

The real question in the present case, in my judgment, is whether before 1875 the triangle mark was used by Messrs. Nicholson to indicate to the purchaser a particular quality of their beer or whether it was used by them not to indicate anything to the purchaser but merely to indicate something to those who were handling the casks for the purpose of storage or carriage.

If the true inference be that Messrs. Nicholson used the triangle mark for the former purpose, such user would be user as a trade mark, but if the true inference be that they used it for the latter purpose only, such user would not be user as a trade mark.

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(1) (1846) 2 Ph. 154.

(2) 30 Rep. Pat. Cas. 677, 695.

In *In re Powell's Trade-Mark* (1) the difference between the two methods of user was clearly pointed out by Bowen L.J. In that case Powell had impressed the term "Yorkshire Relish" on the outside of the packing cases containing his bottles of sauce, each of which bottles bore a label containing his willow pattern trade mark, and it was held that the term "Yorkshire Relish" had not been used as a trade mark. Bowen L.J. says (2): "The term '*Yorkshire Relish*' has been impressed on packing-cases on the outside of the four sides. Is that user a user as a trade-mark of the term '*Yorkshire Relish*'? It seems to me the answer is to be given by the simplest consideration of what is really the function of a trade mark. The function of a trade mark is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. It tells the person who is about to buy, or considering whether he shall buy, that what is presented to him is either what he has known before under the similar name, as coming from a source with which he is acquainted, or that it is what he has heard of before as coming from that similar source. It is obvious that if it is to be an indication to the purchaser's eye of what I have stated, it must either be impressed on the goods or so accompany the goods as to produce that effect upon the purchaser. Accordingly it may be either marked on the goods themselves, or, if that is not possible or convenient, it may be marked on the vehicle of the goods, and may be, and sometimes, I dare say, is, marked upon a covering or exterior, such as a packing-case. But when you are considering a mark upon the vehicle as distinct from a mark upon the goods, you must ask yourself carefully; Is this mark used as a trade-mark? Is its object and use to indicate to the purchaser what I have suggested? The alternative view of a mark placed outside a packing-case may be that its object is not to indicate anything at all to the purchaser, but to indicate something to those who are

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(1) [1893] 2 Ch. 388.

(2) [1893] 2 Ch. 403.

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handling the packing-case either for the purpose of carriage or storage; or it may be to indicate not that the goods are the goods of a particular firm's manufacture, but to indicate the name of the thing inside—to shew what is inside the box. We have in this case to decide between those two contentions."

Two important facts have to be borne in mind in determining whether Messrs. Nicholson's user of their triangle mark was user as a trade mark—namely, first, that the mark is not a word mark (such as "Yorkshire Relish," for instance) describing or designating the contents of the receptacle on which it is placed, but consists of a distinctive device; and, secondly, that the only practical way in which Messrs. Nicholson could use the mark as a trade mark for their best quality bitter beer was by placing it on the casks.

In my judgment, the true inference to be drawn from the alteration made by Messrs. Nicholson in 1865 in their device and in the manner of applying it to the casks is that they intended to give to their customers a better ocular indication as to the make and quality of the beer and as to its trade source than had theretofore been afforded by the plain triangle chalked on the cask heads, which latter would obviously have been amply sufficient if it had merely been intended to serve as a cellar or handling mark.

Sir Duncan Kerly had to admit that the letter "N" was presumably intended to represent the initial letter of Messrs. Nicholson's firm, and I pressed him in vain for some reasonable explanation why that letter should have been added to the triangle unless it were in order that the mark should more readily indicate to the eye of the purchaser not only the quality of the beer in the cask but also the source from which the beer had come.

It is difficult to understand why Messrs. Nicholson (or any other brewers) should place such a distinctive mark as the triangle mark on their casks if the sole object were to indicate to those handling the casks where they should be stored or carried. Moreover, Messrs. Nicholson brewed various other qualities of beer and stout which they sold in casks, and did not apply any distinctive marks to the casks containing those beers or stout, thus showing that the triangle mark was not required merely for handling purposes. In these circumstances, I find myself unable to come to any other conclusion than that Messrs. Nicholson used the triangle mark for the purpose of indicating to customers that the beer in the casks upon which that mark appeared was beer of a certain quality which had been brewed by them.

Messrs. Bass, although they did not deny that the triangle mark was unique in the brewing trade, and appropriate to indicate that the beer came from Messrs. Nicholson, nor that Messrs. Nicholson had used it to indicate the quality of their bitter beer, nor that if a customer had a sequence of deliveries of beer in casks to which the triangle mark had been applied by Messrs. Nicholson in the manner I have described he would come to recognize that it indicated that the beer was Messrs. Nicholson's bitter beer, yet they contended that Messrs. Nicholson's user of the triangle mark was not user as a trade mark for reasons which may be summarized as follows; that before 1875 and for many years afterwards it was not the practice of brewers to place their trade marks on casks; that Messrs. Nicholson did not impress their triangle mark permanently upon their casks, but only applied it temporarily with whiting; that Messrs. Nicholson did not advertise their triangle mark; that the name "Nicholson" branded on the casks was the real mark of origin and not the triangle mark; that Messrs. Nicholson in 1920 admitted both orally and in writing that the triangle mark had not been used as a trade mark; and lastly, that Messrs. Nicholson in 1922 registered their "Camel" trade mark, and had never until now attempted to register their triangle mark. I will deal as shortly as may be with each of these reasons, none of which, however (whether taken singly or together), in my opinion, displace what I think is the true inference to be drawn from the undisputed facts.

It may well be that before 1875 brewers had not made a practice of applying their trade marks to beer sold in casks. Since that date, however, several well known brewers, including Messrs. Bass, have adopted that practice. There is no reason why a trade mark should not be so used, and, as already pointed out, it is the only practical method of using a trade mark in connection with draught beer. Messrs. Nicholson on the evidence were apparently pioneers in this kind of user.

Unless particular casks were to be permanently devoted to a particular quality of beer, which is not a very business-like proceeding, it would be impracticable to affix the trade mark permanently to the casks. When empty the casks are returned to the brewery and are then scoured before being refilled. In the process of scouring the trade mark would naturally be washed off whether it had been stencilled on or whether it had been affixed by means of a paper or card-board label, which appears to be the more modern practice. Moreover, the trade mark if branded on or otherwise permanently affixed to the casks would be liable in process of time to become obliterated or less conspicuous. A mark freshly applied on the occasion of each delivery would therefore obviously be the best way of making it more readily discernible by the purchaser. In the circumstances, the method of applying the mark adopted by Messrs. Nicholson, so far from telling against the use of their triangle mark being user as a trade mark, in my opinion, tends the other way.

Advertisement of a trade mark in the press or on billheads, nvoices and price lists is not a user of that mark. The only way in which a trade mark can be used is upon or in connection with goods. The absence of advertisement therefore has no bearing on the question whether a mark has been used as a trade mark, especially in a case like the present, where Messrs. Nicholson have never advertised any of their beers.

The branding of the name " Nicholson " on the cask heads no doubt serves the dual purpose of indicating the ownership of the cask and the trade source from which the contents had come. The appearance of the name on the cask heads operates to intensify the distinctiveness of the triangle mark. Most traders add their name to, or use it in conjunction with their trade mark, not excepting Messrs. Bass themselves. The use by Messrs. Nicholson of their name as an additional indication of the origin of the contents of their casks does not, in my opinion, in any way displace the inference that the triangle mark was used as a trade mark or part of a trade mark.

As regards the alleged admissions by Messrs. Nicholson, it appears that when in the year 1919 it came to the notice of Messrs. Bass that Messrs. Nicholson were using their triangle mark, Messrs. Bass, as owners of the well known solid triangle mark, who until then had thought that they were the only brewers using any sort of triangle mark, approached Messrs. Nicholson with a view to coming to some arrangement as to the future use by them of their triangle mark. It is not without significance to note that in the first letter which Messrs. Bass wrote to Messrs. Nicholson they treated Messrs. Nicholson's triangle mark as a trade mark. Messrs. Nicholson were old customers of Messrs. Bass, and were willing to oblige them as far as possible. It was alleged by Messrs. Bass's representative, Mr. Burt, that at an interview Mr. William Reginald Nicholson admitted that Messrs. Nicholson had never used the triangle mark as a trade mark; this, however, was denied by Mr. Nicholson, and is not borne out by the correspondence after the interview, in which Messrs. Nicholson's user of the triangle mark in their export trade is discussed and the mark referred to by them as their "Home Trade Mark." It appears, however, that Mr. Burt in a letter written in June, 1921, did state that the triangle mark was not a trade mark, and that Messrs. Nicholson did not write denying this statement, but I do not think that too much weight ought to be attached to this omission on their part; they were then endeavouring to meet Messrs. Bass's wishes. In my opinion, the negotiations, which extended over a long period and eventually broke down, have no real bearing on the question whether the triangle mark was in fact used by Messrs. Nicholson as a trade mark before 1875, and therefore I do not propose to go through them in detail. No estoppel is or can be set up, and no alleged admission made by Mr. William Reginald

Nicholson can alter the facts as proved or admitted. Moreover, Mr. Nicholson stated that he did not know the difference between a quality mark and a trade mark, and Messrs. Bass appear to have thought (in my opinion, erroneously) that user as a quality mark excluded user as a trade mark. The inference I draw from the whole negotiations is that Messrs. Nicholson for the sake of friendship and so long as their accustomed user of the triangle mark was not disturbed, were willing to agree not to extend the manner of this user nor to register their triangle mark, but at the same time were unwilling to waive any rights they might have. The whole of these negotiations, in my opinion, negative the idea that either side considered that the triangle mark was being used as a mere cellar or handling mark. However that may be, the fact remains that after the close of the negotiations Messrs. Nicholson have continued to use the triangle mark as theretofore undisturbed by Messrs. Bass.

Similarly, the registration by Messrs. Nicholson of their "Camel" mark has, in my opinion, very little bearing on the question now to be decided. It might have been different if Messrs. Nicholson had used their "Camel" mark in connection with beer of the same quality at the same time and in the same manner as they had used the triangle mark. In such a case it might have been said that there had been no separate user of the triangle mark as a trade mark, but as the "Camel" mark was not introduced until 1903, and was then used only for bottled beer of a different quality, I do not think that the registration of the "Camel" mark leads to the inference that the user of the triangle mark before 1875 (or since) was not user as a trade mark. The natural presumption is that Messrs. Nicholson did not register the latter because they were content to rely on long user as affording them sufficient protection. Indeed it appears pretty plainly that but for the registration by Messrs. Bass of the word "Triangle" Messrs. Nicholson would not have sought to register their triangle mark at the present time.

In the result, I have come to the conclusion that none of the reasons advanced by Messrs. Bass displaces the inference which ought to be drawn from the undisputed facts that the triangle mark was before 1875 in use by Messrs. Nicholson as a trade mark, and not merely as a cellar or handling mark.

I now turn to the consideration of the further contention of Messrs. Bass, that even if the triangle mark had before 1875 been used by Messrs. Nicholson to indicate the make and quality of their beer and the source from which it came there was no sufficient evidence that the public as a whole had recognized that mark as denoting beer brewed by Messrs. Nicholson and, therefore, that the triangle mark was not a trade mark in use before 1875 within the meaning of s. 19 of the Act of 1905. This contention, which was accepted by and formed one of the main grounds for the decision of Farwell J., is, in my judgment, based on an erroneous view as to the meaning of the expression of " a trade mark in use" before 1875 in the section.

I will assume for the purpose of my judgment on this point that in spite of the fact that the triangle mark had been used by Messrs. Nicholson continuously and openly in Maidenhead and the surrounding district for ten years before 1875, and notwithstanding the evidence of reputation given at the trial, Messrs. Nicholson failed to establish at the trial that the triangle mark had become known and recognized by the public concerned as a whole as being their trade mark, though I think that this question is open to serious doubt.

Be that as it may, however, I am clearly of opinion that no evidence of recognition by the public is required in order to prove that a distinctive mark was in use as a trade mark before 1875. What is required for that purpose is proof that the mark before that date was in fact used as a trade mark, that is, was used by the trader in his business upon or in connection with his goods, and it is not necessary to prove either the length of the user or the extent of the trade. In other words, the character and not the length or extent of user is the only thing that has to be established. Ever since Lord Cottenham in *Millington* v. *Fox* (1) decided that fraud was not an essential ingredient in order to obtain an

(1) (1838) 3 My. & Cr. 338.

injunction to restrain infringement of a trade mark, it was recognized by Courts of equity that there was a right of property in a trade mark, and that such right did not depend on length of user or reputation in the market. Before the Act of 1875 it had been definitely established that the only essential quality for constituting property in a trade mark (unobjectionable in itself) was that it should have been used by the proprietor in his business upon or in connection with some vendible article.

The judgment of Sir John Romilly in *Hall* v. *Barrows* (1) contains the following passage, which was not questioned when the case came before the Court of Appeal, and has ever since been accepted as a correct statement of the law on this point (2): "It must, therefore, be conceded that some property exists in the use of a trade mark, which at present is sufficient to support an action and to maintain an injunction. It is true that this property, like property in a goodwill, is of a very evanescent character; still, frequently, it is one of great value. It is clear from a variety of decided cases that a manufacturer who has originally stamped his goods with a particular brand, has a property in his mark at law, and can sustain an action for damages for the use of it by another. It is also clear that Courts of equity will restrain the use of it by another person. It has sometimes been supposed that a manufacturer can only acquire such a property in a trade mark as will enable him to maintain an injunction against the piracy of it by others, by means of a long-continued use of it, or, at least, such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a Court of equity cannot depend on the length of time the manufacturer has used it. If the brand or mark be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but, provided it has been originally adopted by a manufacturer, and continuously, and still used by him to denote his own goods when brought into the market and offered for sale, than I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbours cannot use that mark. Were it otherwise, and were the question to depend entirely on the time the mark had been used, or the reputation of it had been acquired, a very difficult, if not an insoluble inquiry, would have to be opened in every case, namely, whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it."

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(1) (1863) 32 L. J. (Ch.) 548.

(2) 32 L. J. (Ch.) 551.

Lord Westbury L.C. in *McAndrew* v. *Bassett* (1), in answer to the argument that property in a trade mark must be regarded as the offspring of such an antecedent user as would be sufficient to have acquired for the article stamped with the trade mark general notoriety and reputation in the market, and that the property could not be held to exist until the fact of that general user, that notoriety, and that public reputation had been proved to exist, says as follows : "I am not in this case driven to the necessity of determining when for the first time property may be said to be established in a trade mark. An element of the right to that property may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably would be found to be no other than these :— first, that the mark has been applied by the plaintiffs properly, (that is to say,) that they have not copied any other person's mark, and that the mark does not involve any false representation ; secondly, that the article so marked is actually a vendible article in the market ; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description." As regards the third ingredient, it is clear that fraud is not necessary.

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(1) (1864) 4 De G. J. & S. 380, 384.

The opinion so expressed by Lord Westbury was approved and applied by the Court of Appeal in *Maxwell* v. *Hogg.* (1) In that case the Court apparently did not treat the user of the mark on one issue of the magazine only as a bar to the counterclaim by the defendant for an injunction, but decided against him on other grounds.

In *Spencer's* case (2) Lord Esher states the test to be applied in determining whether a mark was in use as a trade mark before 1875 in the following words: "How does a man use a trade mark in his trade? By putting it on his goods. By using it either by stamping it on his goods, or by putting a label on his goods. You do not use a trade mark by having it shut up in your warehouse; you do not use a trade mark by having it put up in your warehouse; and you do not use a trade mark by advertising it in a newspaper. It is only by putting it on your goods, so that when your goods are sold in the market there is the distinguishing mark."

The cases to which I have referred (and there are others to the like effect) show that it was firmly established at the time when the Act of 1875 was passed that a trader acquired a right of property in a distinctive mark merely by using it upon or in connection with his goods irrespective of the length of such user and of the extent of his trade, and that such right of property would be protected by an injunction restraining any other person from using the mark. It follows from this that when the Trade Marks Acts speak of "a trade mark in use before the 13th August, 1875," a trade mark which has been used in the manner indicated by Lord Esher in *Spencer's* case (2) is intended, and that it is not necessary to embark upon an inquiry (which Lord Romilly characterized as very difficult if not insoluble) whether and when first the mark became recognized by the public as denoting the goods of the trader, unless the mark proposed to be registered is prima facie non-distinctive and consequently does not become a trade mark at all until by reputation in the market it has come to denote the goods of the trader using it.

(1) (1867) L. R. 2 Ch. 307.

(2) 3 Rep. Pat. Cas. 73, 74.

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The error into which, in my opinion, the learned judge has fallen consists in treating the evidence required to establish that an admittedly unobjectionable and distinctive mark was in use as a trade mark before 1875 as the same as would be required if Messrs. Nicholson had been seeking to register a word mark, which was prima facie non-distinctive, but which they alleged had by reputation come before 1875 to denote their beer; in such a case, as in all passing off cases, where the get-up or (since the Trade Marks Acts) an unregistered mark is alleged to have been imitated, evidence of reputation would no doubt be required.

There is a passage in the judgment of Lord Esher M.R. in *Richards* v. *Butcher* (1), which was relied on by Sir Duncan Kerly as showing that evidence of acceptance by the public is required in order to constitute user of a mark as a trade mark before 1875. The point there was whether the words "Monopole" and "Dry Monopole" were special and distinctive words used before the passing of the Act of 1875 within the meaning of s. 10 of that Act. The Court decided on the facts that the words in question were not special and distinctive, and had not been used as trade marks within the meaning of the section. The passage to which reference was made is as follows (2): "You use the thing 'as a trade-mark,' if you use it in business, or, as is often said, in the market, as a mark to denote your goods, and to distinguish them from the goods of anyone else. You use it, not merely as a writing, but as a mark in the market, and you must shew that you used it in the market for the purpose of distinguishing your goods, and, I think, you must also shew that the market accepted it as a distinguishing mark of your goods—then you use it as 'your trade-mark.'"

The opinion expressed by Lord Esher that acceptance in the market must be shown, if it was intended to apply generally—that is to say, to distinctive as well as to non-distinctive marks—was not necessary for the decision in that case, and is contrary to the current of authority to which I have referred. I think Lord Esher when expressing that

(1) [1891] 2 Ch. 522.

(2) [1891] 2 Ch. 522, 543.

opinion must have had in mind cases of prima facie non-distinctive marks such as he was considering in that case, as I do not think he could have intended to express his dissent from such cases as *Hall* v. *Barrows* (1); *McAndrew* v. *Bassett* (2); and *Maxwell* v. *Hogg* (3); or from his own opinion in *Spencer's* case (4), none of which cases was apparently cited. If, however, I am wrong in this view, I can only say that I do not agree with the opinion so expressed in so far as it purports to apply to such a case as the present, where the mark is inherently distinctive. In such a case a trader in however small a way of business and however recently his business may have been established, is entitled to have his mark registered as a trade mark if he can prove that he has used it in his business before the statutory date upon or in connection with some vendible goods.

In the result, my conclusion on this point is that Messrs. Nicholson had before 1875 acquired a right of property in their triangle mark, and could have restrained another brewer from infringing it and, further, that as on the undisputed facts the mark had been placed on all casks containing Messrs. Nicholson's best quality bitter beer continuously from the year 1865 onwards the mark was a trade mark in use before August 13, 1875.

A further objection taken on behalf of Messrs. Bass was that the mark as now proposed to be registered is not the mark as it had been used by Messrs. Nicholson before 1875, because it includes the name "Nicholson." This objection seems to me a somewhat odd objection for Messrs. Bass to take. I could more readily have understood their objecting to Messrs. Nicholson obtaining registration of their triangle mark without the name "Nicholson" as part of it, as it must be to Messrs. Bass's advantage, if the triangle mark is to be registered at all, that the name should form part of the registered trade mark. It is, of course, quite immaterial to Messrs. Nicholson whether the name is included as part of their registered mark or not; they are content to use their

(1) 32 L. J. (Ch.) 548.
(2) 4 De G. J. & S. 380.
(3) L. R. 2 Ch. 307.
(4) 3 Rep. Pat. Cas. 73.

triangle mark as hitherto, and can, of course, do so whether the name is registered as part of the mark or not. In fact Messrs. Nicholson applied to register their triangle mark without the name, and only added it because the Assistant Comptroller came to the conclusion that it formed part of the trade mark as used. The evidence shows that one of the purposes served by the branding of the name on the cask heads was to indicate to purchasers the source of the manufacture of the beer, and the learned judge so found. If it were otherwise all Messrs. Nicholson's beers other than their best quality bitter beer would have been going out from their brewery without any indication of origin. The name on the cask necessarily carries with it an assurance to the purchaser that the casks contain Messrs. Nicholson's beer, and it stands to reason that Messrs. Nicholson's reputation as brewers lies behind the beer contained in every cask branded with their name. To take an analogous case, I do not suppose it could be doubted for a moment that the name "Schweppes" introduced in the course of manufacture into the glass of a syphon or bottle would convey to a purchaser that the syphon or bottle contained soda water made by Schweppes, although one of the purposes of introducing that name was to indicate the ownership of the syphon or bottle, and to ensure its return to the owners. Neither the fact that Messrs. Nicholson apparently did not envisage their trade mark as consisting of a combination of their triangle device and their name, nor the fact that they did not intend that their name should form part of their trade mark (if they had any intention in the matter at all), seems to me to be material for the purpose of determining what they had in fact used as their trade mark. In the case of an old mark the whole mark as it has been used must be registered. A trader will not be permitted to register part of what he has in fact used as his trade mark, although he may not have appreciated that some added matter usually accompanying the mark formed part of the mark, and although he may not have intended that such added matter should form part of the mark. Nor is it right to say that because the trader did

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not appreciate that his trade mark consisted of a device and some added matter or name and not of the device alone therefore he will not be permitted to register the whole trade mark at all. The truth is that what has to be looked at when registering an old mark is how was it used and what according to the true inference to be drawn from such user constitutes the whole mark. The experienced Assistant Comptroller on learning how Messrs. Nicholson had in fact used their triangle mark for ten years before 1875 (and ever since) came to the conclusion that in view of such decisions as *Richards* v. *Butcher* (1) and in *In re Heddle & Co.'s Application* (2) the whole trade mark as used consisted of the device and the name, and that Messrs. Nicholson ought not to be allowed to register their triangle mark without the name "Nicholson"; he therefore directed the application for registration to be amended by adding that name. In so doing he judged from an inspection of a cask head produced to him what an ordinary purchaser would conclude from the actual user was the whole of Messrs. Nicholson's trade mark. It would, of course, be impossible to prove to what extent Messrs. Nicholson's customers as a whole relied on the name "Nicholson" and to what extent on the triangle device alone as indicating the origin of the beer in the casks. The device on the casks no doubt was more conspicuous than the name, but nobody can say what a purchaser might have thought if a cask had been delivered to him on which the name "Nicholson" had not been associated with the triangle mark on the cask head. The proper inference in the circumstances is that purchasers relied upon both the triangle mark and the name as indicating the make and quality of the beer and the trade source from which it had come. In *Richards* v. *Butcher* (3) Lord Esher M.R. considered that the fact that the word "Monopole" had appeared on one side of the packing case and the name "Heidsieck & Co." on the other did not prevent him from drawing the inference that the mark as a whole consisted of a combination of the word "Monopole"

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(1) [1891] 2 Ch. 522.

(2) 20 Rep. Pat. Cas. 599.

(3) [1891] 2 Ch. 522, 546.

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and the name "Heidsieck & Co.," and stated that "we must ask ourselves what is the true inference to be drawn, not by a refined lawyer, but by an ordinary buyer or seller?" Kay J. in the same case in the Court below said (1): "'User as a trade-mark' means, not what the person who uses has in his own mind about it, ... but what the public would understand when the trade-mark or so-called trade-mark is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade-mark."

In *Heddle & Co.'s* case (2) the facts are practically on all fours with the facts in the present case. There the applicants sought to register a device as an old mark without the name "Heddle & Co.," and Byrne J. declined to allow the registration without that name, holding that it formed part of the trade mark as used, and after stating that the device had never been used without the name of "James Heddle & Co." or "James Heddle & Co., Leith," or "James Heddle" being branded on the cases in juxtaposition to it, though not always in the same position, and after referring to Lord Esher's judgment in *Richards* v. *Butcher* (3) said (4): "Speaking generally it has been well established by the authorities that you must show that the mark you seek to register was used as you seek to register it, and without other matter before 1875." This statement of the law made over twenty-seven years ago has not to my knowledge ever been questioned, and the authorities to which the learned judge refers and his own decision have been accepted as meaning that if an applicant seeks to register a device as a trade mark in use before 1875, he must register as part of the mark all such added matter as was actually used by him with the device, and will not be permitted to register the device alone; the principle being that a trader will not be allowed to register a device as an old mark if it was only used before 1875 as part of a mark.

In determining in the present case whether the name "Nicholson" formed part of the Messrs. Nicholson's trade

(1) [1891] 2 Ch. 532.
(2) 20 Rep. Pat. Cas. 599.
(3) [1891] 2 Ch. 522, 545.
(4) 20 Rep. Pat. Cas. 599, 603.

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mark, the question is what is the true inference which the Court ought to draw from the fact that the triangle mark and the name have always appeared on the cask heads together, that is, what would an ordinary buyer conclude? not what was in the mind of Messrs. Nicholson or what they may have thought was their trade mark. In my opinion the Assistant Comptroller has drawn the right inference, that as the name "Nicholson" had in practice been so closely associated throughout with the triangle mark, it must for registration purposes be treated as part of the trade mark as used by Messrs. Nicholson before 1875.

If, however, the true view be that the name "Nicholson" did not form part of the trade mark as used by Messrs. Nicholson before 1875, the only result, in my opinion, would be that they would be entitled to register their triangle mark alone omitting the name "Nicholson," and I cannot see what advantage Messrs. Bass or any member of the public would gain by such omission. This objection has no merits, as the name will serve to further distinguish the mark from those of Messrs. Bass, whose only concern is to see that it will not be confused with their marks.

Two points on the construction of the Act of 1905 taken on behalf of Messrs. Bass remain to be dealt with—namely first, that the exception as to old marks in s. 19 is limited to marks coming within the proviso to s. 9, and secondly, that, s. 11 is an over riding section, and prevents the registration of Messrs. Nicholson's triangle mark.

As to the first of these points, I cannot find anything in s. 19 nor in any other provisions of the Act which justifies the contention that the exception of trade marks in use before 1875 in s. 19 is confined to old marks coming within the proviso to s. 9. It would indeed be strange if the proprietor of an old mark which contained or consisted of one of the essential particulars enumerated in paras. (1.) to (5.) of s. 9 could not obtain registration of his trade mark as an old mark under s. 19, whilst the proprietor of an old mark not containing or consisting of any of such particulars, but coming within the proviso to s. 9, could obtain such registration.

Sir Duncan Kerly cited *In re Wright, Crossley & Co.'s Application* (1) in support of his contention on this point. In that case Byrne J., purporting to follow and apply the decision of the House of Lords in *Perry Davis & Son* v. *Harbord* (2), held that a mark containing a device did not come within s. 64, sub-s. 3 (ii.), of the Patents Act of 1883, as amended by s. 10 of the Act of 1888, and that therefore in order to be entitled to registration it must consist of or contain an essential particular mentioned in s. 64, sub-s. 1, and further, that as s. 74 did not apply in that case, because no addition to the mark as used was asked for, the applicants were not entitled to registration without disclaiming non-essential particulars under s. 64, sub-s. 2. This decision (whether right or wrong) in my opinion has no bearing on the question whether the exception in s. 19 of the 1905 Act extends to all old trade marks or is confined to those only which come within the proviso to s. 9. The point which Byrne J. had to consider was whether the applicants had complied with s. 62, sub-s. 2, of the 1883 Act, inasmuch as in their application they had not specified the essential particulars of the mark, and had not disclaimed the right to the exclusive use of the added matter. The Act of 1905 abolished the whole system of additions to trade marks with disclaimers; under that Act a mark if it be a registrable mark within the meaning of s. 9 either because it contains or consists of one of the essential particulars mentioned in paras. (1.) to (5.), or because it comes within the proviso, will be registered as a whole subject only to any disclaimer imposed as a condition under s. 15. Not only were the statutory provisions which the Court had to consider in *In re Wright, Crossley & Co.'s Application* (1) different, both in language and substance, from those which we have to consider here, but the decision itself affords no assistance whatever in determining the point made by Sir Duncan Kerly, which point, in my opinion, is ill founded.

As to the second point. Sir Duncan Kerly contended that s. 11 is an over riding section, and that no old mark ought to

(1) [1900] 2 Ch. 218.

(2) 15 App. Cas. 316.

be registered under s. 19 which by reason of its resemblance to a mark already on the register is calculated to deceive.

It is clear that s. 11 (which comes from ss. 73 and 86 of the Act of 1883) must, having regard to the decision in *Eno* v. *Dunn* (1), be taken generally to include cases in which deception would result from the similarity of the mark sought to be registered to one previously in use by another proprietor: see *In re Compagnie Industrielle des Pétroles' Application* (2) and *In re Albert Baker & Co.'s Application.* (3)

In the first place, as the foundation of their contention on this point, Messrs. Bass maintain that they have established that the trade mark which Messrs. Nicholson seek to have registered so nearly resembles the well known solid triangle trade mark of Messrs. Bass as to be calculated to deceive. Having regard to the difference between the two marks, and bearing in mind that not a single case of deception has been proved or even suggested, although there has been concurrent user of the two marks in Maidenhead and district for upwards of half a century, and, further, bearing in mind that as to any extended user by Messrs. Nicholson registration does not confer any right upon them to pass off their goods as those of another person (see s. 45 and *In re Lyle & Kinahan's Application* (4)), I am by no means satisfied that even if s. 11 applies to the present case Messrs. Nicholson have not discharged the onus which lies upon them under that section of proving that their triangle mark is not calculated to deceive. The evidence that the two marks are likely to be confused is weak, and to my mind unconvincing. The real objection of Messrs. Bass is based on the ground that the decision in *In re Worthington & Co.'s Trade-Mark* (5) has secured to them a monopoly of every form of triangle mark for beer. In my opinion that is putting the result of this decision far too high. When that case was decided colours could not be registered, and from a perusal of the judgments of the majority of the members of the Court of Appeal, it is plain that the real ground why Worthington's mark was not allowed to be registered was that if the whole mark were coloured red it would too nearly resemble Messrs. Bass's well known solid red triangle. In the present case, any deception likely to result from colouring Messrs. Nicholson's triangle mark red is guarded against by the limitations as to colour imposed by the Assistant Comptroller.

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(1) (1890) 15 App. Cas. 252.

(2) 24 Rep. Pat. Cas. 585.

(3) [1908] 2 Ch. 86.

(4) 7 Rep. Pat. Cas. 249.

(5) 14 Ch. D. 8.

But assuming that I am wrong, and that Messrs. Nicholson's mark can be said to resemble Messrs. Bass's solid triangle so nearly as to be calculated to deceive, I am still of opinion that it can and ought to be registered under s. 19, notwithstanding the provisions of s. 11. Treating s. 11 as a general prohibition, then according to the well known canon of construction, the exception as to old marks in s. 19 ought to be read as a specific exception from that general prohibition.

In the provisions corresponding to s. 19 contained in the Acts of 1875, 1883 and 1888, old marks had not been specifically excepted, but it had been decided by Jessel M.R. in *In re Jelley, Son & Jones's Application* (1), and in other cases, that (subject to the three-mark rule) every trader who could prove that he had used a trade mark (unobjectionable in itself) before the statutory date, was entitled almost as of right to have it registered under the Acts. This decision received recognition by the Legislature in the Act of 1905, which for the first time specifically excepted old marks from s. 19, and I think I am right in saying that ever since that section became operative no distinctive mark which has been proved to have been in use as a trade mark before the statutory date has been refused registration.

This disposes of all the objections taken to the application of Messrs. Nicholson to register their triangle mark, and I now turn to their application to rectify the register by striking out Messrs. Bass's registration of the word "triangle."

If I am right in my conclusion that Messrs. Nicholson have used their triangle mark as a trade mark, and are entitled to register it, it follows, in my opinion, that the word "triangle" must come off the register. I did not understand Sir Duncan Kerly seriously to contend to the contrary.

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(1) 51 L. J. (Ch.) 639*n*.

It is plain that Messrs. Nicholson's mark is properly described as a "triangle" mark, and has for many years been indicated in Messrs. Nicholson's price lists and by their customers by the symbol of a plain triangle; in fact, one of the main objections taken by Messrs. Bass is that it was obviously a "triangle" mark, and would undoubtedly be referred to as such, and, moreover, would cause the beer in the casks on which it was stencilled to be called "triangle" beer.

In these circumstances I think that the Assistant Comptroller was right in holding that the word "triangle" describes a genus of which Messrs. Bass and Messrs. Nicholson's trade marks are species, and consequently that the word "triangle" at the date when it was registered was not adapted to distinguish Messrs. Bass's beers from the beers of Messrs. Nicholson.

On the whole, for the reasons stated, I am of opinion that the decision of the Assistant Comptroller on both applications was right, and ought to be restored, and that the appeals to this Court ought to be allowed with costs here and below.

ROMER L.J. The first question upon which it is necessary to come to a conclusion on these appeals is, whether the mark that Nicholson & Sons, Ld., are seeking to register was in use as a trade mark before August 13, 1875, within the meaning of s. 19 of the Trade Marks Act of 1905. The question is partly one of fact and partly one of law, and under both heads is one of some difficulty.

As to the question of law, it is desirable to deal in the first place with the contention advanced on behalf of the respondents, that a trade mark used before August 13, 1875, is not entitled to the privileges conferred upon such a mark by s. 19 of the Act, unless it be such a mark as is described in the proviso to s. 9, para. (5.). It is said quite truly that the mark in question in this case does not come within the proviso. But even so, I fail altogether to understand why, if it was in fact used before August 13, 1875, it is not entitled to take advantage of s. 19. A mark that comes within any of the first five paragraphs of s. 9 of the Act is registrable, whether it was or was not in use before August 13, 1875. It is only when the mark does not come within any of those paragraphs that it has to rely upon its antiquity. The proviso to para. 5 is merely one of the privileges granted to an old mark. The exception contained in s. 19 is another. I can see no ground for holding that an old mark is not entitled to claim the latter privilege, merely because it is not qualified, and does not, for the purposes of registration, need to claim the former.

The next contention on the part of the respondents is as to the meaning of the words "in use as a trade mark." They say that in order to constitute user of a trade mark two things must exist concurrently—namely (1.), the intention of the proprietor of the mark to indicate by its use the origin of the goods upon or in connection with which it is used; (2.) recognition of the mark as indicating origin on the part of that section of the public with whom the proprietor deals. Now I do not doubt that for the purpose of ascertaining the nature of the user of a mark one may legitimately take into consideration both the intention of the owner of the mark, and the effect that the user has had upon the public, and the absence of both intention and public recognition would render it difficult if not impossible to treat the user as being user as a trade mark. But I can see no reason whatever for regarding both intention and recognition by the public as essential conditions of such a user. If a trader uses a mark upon or in connection with his goods with the intention of indicating their origin, surely he is using it as a trade mark from the moment of the first user, which will probably be many months before the public has come to recognize the mark as indicating origin. If public recognition be a requisite of user as a trade mark, the proprietor must necessarily remain in ignorance of whether he is or is not using a trade mark until by some means or another he has ascertained the views of the public upon the matter. How he is to do this has not been explained to me, and I do not know. But it is quite clear that he can never ascertain when the public first regarded the mark as indicating origin, and must ever be unable to answer the question: "When did you first use the mark as a trade mark?" In my opinion a trader is, at any rate, using a mark as a trade mark when he first uses it upon or in connection with his goods with the intention of indicating origin, assuming, of course, that it is a mark capable of so doing. In other words, intention without public recognition is enough. But is public recognition without intention enough? Supposing a manufacturer, for merely æsthetic or decorative motives, or merely warehouse purposes, uses a mark on or in connection with his goods, and such mark comes to be recognized by the public as indicating origin, has the mark been used as a trade mark? I can see no reason for thinking that it has not. It is said that in such a case the mark does not come within the definition of a trade mark in s. 3 of the Trade Marks Act, 1905, which, so far as material, is in these words: "A mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture." But I do not read the words "for the purpose" as necessarily meaning "with the intention." Where, as in the case I have supposed, the mark has been used in such a way as to have served the purpose of indicating origin, it seems to me to come within the definition. The question is not, however, one that can often arise. For if a mark is being used in such a way as I have indicated—as a quality mark, for example—it is almost impossible that the public could ever come to regard it as indicating origin, unless the mark be unique in the particular trade. Now, where a manufacturer chooses as a quality mark for certain of his goods one that is unique in the trade, he must, as it seems to me, have the intention, even though he be unconscious of it, of thereby indicating that the goods in question are of his manufacture.

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For in choosing a mark that is unique he is deliberately selecting one that is not being used by other manufacturers, and that will be used on his goods and on those of none other. If this were not so, he might just as well use a mark that is common to the trade. He is therefore necessarily choosing one that will indicate not only the quality of the goods but their origin as well, and he uses the mark with the intention, amongst others no doubt, of indicating that the goods are of his manufacture. But there are a few cases, and the present case is unfortunately one of them, in which it does become necessary to consider whether in order to prove user of a mark as a trade mark it is necessary to prove the intention of the proprietor that the whole of the mark shall indicate origin. The cases are those in which the mark in question is what is sometimes referred to as a composite mark, that is to say, a mark composed of two or more separate integers. Examples of such marks will be found in *In re Crompton & Co.'s Trade-Mark* (1); *Richards* v. *Butcher* (2); *Heddle & Co.'s* case. (3) In such cases it must often happen that the proprietor of the mark regards one only of the integers as denoting the origin of his goods. In *Richards* v. *Butcher* (2), for instance, I have little doubt but that Messrs. Heidsieck regarded the word "Monopole" as the distinctive part of their mark. If, therefore, a trader in order to prove user of the mark as a trade mark has to prove an intention to indicate origin by each integer, he would often fail. In my opinion, however, it is not necessary to prove such intention, even if intention be necessary to constitute a user of a trade mark. For if the proprietor of a composite mark uses it on or in connection with his goods, but regards one only of the integers as indicating origin, he is really using the composite mark regarded as a whole with the intention of indicating origin, even though he attaches no importance to the other integers from the point of view of distinctiveness. He is using the mark as a whole with the intention of indicating origin, though he may not be using the whole of the mark with that intention. It would not have helped Messrs. Heidsieck to show that they only intended the part of their composite mark that consisted of the word "Monopole" to indicate origin, nor would it have helped the applicants in *Heddle & Co.'s* case (1) to prove that the words "James Heddle" were never intended by the proprietors of the mark to form part of the trade mark. It was indeed argued in that case that the words "trade mark" that appeared on the goods had reference only to the mark that the applicants were seeking to register, and did not refer to the name "James Heddle." Byrne J. was not satisfied as to this, but he added: "Whatever he called it, the public and the market would associate all the words used . . . . as being part of the mark by which the vendor intended to identify his goods in the market." As was pointed out in *In re Crompton & Co.'s Trade-Mark* (2), where a composite mark used on goods includes an integer that is not of itself distinctive, it is nevertheless an inevitable business result that the whole mark is being used to distinguish the goods.

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(1) [1902] 1 Ch. 758.

(2) [1891] 2 Ch. 522.

(3) 20 Rep. Pat. Cas. 599.

Let me now apply these principles to the facts of the present case, facts which are not seriously in controversy. Of these facts the most pregnant is this, that in 1865 Messrs. Nicholson began marking the end of the casks that contained their bitter beer with the triangle containing the "N," and have done so ever since. It is said that this was a quality mark. Of course it was. But a quality mark may also indicate origin, and when it is unique in the trade it must in my judgment necessarily do so. After this lapse of time it is not surprising that there is no evidence as to the reason for the adoption of this mark instead of the plain triangle, which had apparently been used from about 1840 to 1865. The person who could have thrown light upon it was the father of Mr. F. W. Nicholson; he, however, has been dead for many years. Mr. F. W. Nicholson himself entered the business in 1865, but was only fifteen years of age at the time. But though there is no evidence, one may assume that there was some reason for putting the "N" into the triangle, even though this was contemporaneous with the adoption of stencils for marking all the quality marks; and for myself I am unable to think of any sensible reason for doing it other than the desire to have a mark for this one quality of beer that would be indisputably different from any quality mark used by any other brewer. There can be no advantage in having such a mark for cellar purposes only; and it appears to me to be an almost irresistible inference that the mark was adopted for the additional purpose of indicating to the public that the beer inside the barrel was Nicholson's beer. It is true that there was branded upon the barrel the word "Nicholson," and sometimes in addition the word "Maidenhead." But I do not think that this fact in any way weakens the inference that the "N" triangle was intended to indicate origin. The word or words so branded were not always easy to see, especially if the barrel were old, or if, as sometimes happened with the smaller barrels, the stencilled triangle partly covered up the name. Indeed, this is a fact much relied upon by the respondents in answer to the contention of the appellants that the name "Nicholson" formed part of their trade mark as actually used, a contention that I must deal with later; but it is a fact that the respondents ignore, when controverting the appellants' contention that the "N" triangle was intended to indicate origin. The conclusion I have come to is that this triangle has been used by the appellants or their predecessors in business at all material times since the year 1865 as a trade mark or part of a trade mark indicating the origin of their bitter beer. Its user was not a large one, but it is not necessary for the appellants to show that it was. It was not used in many of the ways in which at the present day well known trade marks are used. But again it is not necessary for the appellants to show that it was. It was used, at any rate in the only way in which a trade mark for a beer always sold in cask and never sold in bottles would be used at a time when it was not the practice, or at any rate was not the practice of Messrs. Nicholson, to advertise barrel beer. It was on the barrels that were shown at the Brewers' Exhibitions of 1912,

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(1) 20 Rep. Pat. Cas. 603.

(2) [1902] 1 Ch. 758.

1926 and 1927, and on those that were delivered to customers, both for private consumption and for trade purposes. There is, moreover, evidence that to such customers it indicated origin. The evidence that it did so before August, 1875, is naturally very meagre. But Mr. F. W. Nicholson deposed to this fact, and it seems immaterial that he draws no distinction between the plain triangle and one with an "N" in it. If the former indicated origin, a fortiori must the latter have done so. The deponent Nash also deposes to the fact that customers who were not tied customers used to order Nicholson's bitter beer as "Triangle." William Montague and Henry Pert also say that customers referred to the bitter beer by the word "Triangle," though they draw no distinction between different classes of customers such as tied and free publicans. It must, however, be remembered that there were no tied customers before the year 1886. But there is abundant evidence that after 1875 the triangle with the "N" was indicative of the origin of the beer: see, for example, the declaration of Mrs. Ashley (in particular her cross-examination), Mrs. Brill, Davies, Martin (who also sold Bass on draught), and Merrick. Now, if the mark indicated origin after 1875, one may infer that it did so before that year, seeing that it had been in use for ten years. The mark, of course, indicated quality as well, and to those who already knew the origin of the beer it would indicate quality only. When, therefore, it was not necessary or desired to indicate origin, the plain triangle was almost exclusively used. This was the case in the brewing books, the price lists of Messrs. Nicholson, and in orders addressed to them. It would not, however, be right to infer from this that the "N" triangle was not used, or regarded by the public or by Messrs. Nicholson, as a trade mark. The question is whether when the "N" triangle was used on the cask it did or did not indicate origin. The question must, as it seems to me, be answered in the affirmative, unless one is prepared to assert that Messrs. Nicholson would not, say in July, 1875, have been entitled to restrain another brewer from selling beer in a cask so marked. It is in my opinion unarguable that they would not. But, if they were so entitled, it could only be on the ground that by the use of the mark the other brewer was passing off his beer as that of Messrs. Nicholson; in other words, that the mark indicated origin.

It is said however that in the correspondence of 1920 and 1921 Mr. W. R. Nicholson clearly showed that he regarded the mark as having been used as a quality mark and nothing else. That the correspondence at first sight affords strong ground for this contention must be admitted. But, on reflection, I am by no means satisfied that the contention is sound. If he looked upon the mark as a quality mark only, then he must have treated it as one that gave no indication of origin. But, in that case, I cannot very well understand why there was any occasion for the correspondence at all. A quality mark that does not indicate origin must be open to the whole trade, and it could matter little to Messrs. Nicholson whether they marked their bitter beer with one mark or another so long as the mark was different from that employed to indicate the other kinds of beer that they were brewing. It is, however, apparent on reading the correspondence that Mr. Nicholson attached some importance to the continued user of the mark. If he had not, I cannot think that he would have refused to accede to the request of Messrs. Bass to abandon it, merely in order to save the cost of cutting another stencil. The parties appear to have been on friendly terms at the time and desirous of acting reasonably towards one another. It would have been a churlish thing to refuse to give up a mark that indicated no more than that the barrel on which it was placed contained bitter beer. It was, however, a very different matter if the mark had come to indicate to the public that the barrel contained bitter beer brewed by Messrs. Nicholson. I strongly suspect that the phrase "used as a quality mark only" meant to Mr. W. R. Nicholson "used only in connection with beer of a particular quality." For these reasons I am not disposed to attach much importance to the correspondence.

Nor, in my opinion, should too much importance be attached to the adoption and subsequent registration by

Messrs. Nicholson of the "Camel" trade mark. The bitter beer, which in the view that I have expressed has been sold to the public under a trade mark consisting wholly or partly of the "N" triangle, was never bottled except privately for Mr. Nicholson. When, therefore, Messrs. Nicholson desired to have a trade mark for their bottled beer, it was not only natural, but essential, for them to select a mark other than their triangle, which latter mark indicated not only origin but also a particular quality of beer.

When Messrs. Nicholson applied in 1920 for registration of the "Camel" mark no similar application was made in respect of their triangle. Having regard to the difference in the goods sold under the two marks, it would not, I think, be right to infer from this that the triangle was not regarded as a trade mark. The explanation given by Mr. Walter R. Nicholson for not registering their triangle is, however, unconvincing and unsatisfactory, and it seems to me that the real explanation is that at this time Mr. Nicholson did not attach sufficient importance to this triangle mark to have it registered, and I suspect that had it not been for the registration by Messrs. Bass in the month of March, 1926, of the word "Triangle," Messrs. Nicholson would never have sought to register their own mark. This action on the part of Messrs. Bass was evidently regarded as challenging the right of Messrs. Nicholson to continue even the limited user that had been made of their mark up to that time, and the application for its registration seems to have been made in self-defence. But whether this be so or not, I am unable to resist the conclusion that the "N" triangle has been continuously used as a trade mark or as part of a trade mark from 1865 down to the present time. It now becomes necessary however to consider whether this triangle was alone the trade mark or was part only of the trade mark. In other words, did the name "Nicholson" also form part of the mark?

Now, as to this, it is said by the respondents that Messrs. Nicholson never regarded this word as forming any part of the trade mark used on their casks of bitter beer. This contention is, in my judgment, well founded.

The mark of Messrs. Nicholson that formed the subject-matter of the correspondence in 1920 was the "N" triangle, and nothing else. No one suggested at that time that the word "Nicholson" even formed part of it. Nor did any one suggest it until the application to register as amended on December 30, 1926, first came before the Assistant Comptroller. As a result of what happened then, the application was further amended so as to include the word "Nicholson" as part of the mark sought to be registered. It seems quite clear that the amendment was made at the instance of the learned Assistant Comptroller, and not by reason of any suggestion on the part of the applicants. But the word "Nicholson" did in fact always appear upon the barrels of bitter beer in addition to the "N" triangle. Having regard, therefore, to such decisions as that in *Heddle & Co.'s* case (1), the learned Assistant Comptroller, no doubt, gave the applicants perfectly sound advice. It was an "inevitable business result" that if there was any mark on the barrels to distinguish the contents from the beer of other brewers, the word "Nicholson" formed part of it. If, however, in order to prove that the composite mark now sought to be registered has been used as a trade mark, the applicants must show that they intended so to use each of the two integers, the applicants will fail.

They, of course, intended to have the word "Nicholson" on each barrel, and the name clearly indicates origin, but, for some reason or another, it does not seem to have occurred to Messrs. Nicholson that it formed part of their trade mark. For the reasons given earlier in this judgment, however, I do not think that this is fatal to their contention that the composite mark has in fact been used as a trade mark. Inasmuch as the composite mark, which admittedly is capable of being distinctive, has appeared on each barrel of bitter beer from before August 13, 1875, down to the present time, the applicants have in my judgment proved its user as a trade mark during that period, even though they fail to show that they regarded each part of it as being so used.

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(1) 20 Rep. Pat. Cas. 599.

I do not attach any importance to the fact that the word "Maidenhead" was occasionally branded on the barrels in addition to the word "Nicholson." Had the applicants attempted to prove that it formed part of their trade mark, they must I think have failed. The branding of the word was unusual, and apparently more or less accidental.

The next question to be decided is whether registration of the mark ought to be refused on the ground that it is calculated to deceive. Farwell J. came to the conclusion that by reason of its similarity to the registered trade marks of Messrs. Bass consisting of or including a solid triangle, there would be such a risk of deception that registration ought to be refused.

That there may be some risk of deception must, I think, be admitted, though in view of the conditions that the learned and experienced Assistant Comptroller thought fit to impose upon the applicants, the risk is not, in my opinion, nearly so serious as the respondents would have us think. I should not have thought that any one possessed of average intelligence could possibly confuse the mark of Messrs. Nicholson with any existing mark of Messrs. Bass. The confusion that, as it seems to me, might arise would be due to members of the public on seeing the triangle jumping to the conclusion that the mark was a new trade mark adopted by Messrs. Bass. The word "Nicholson" would prevent even this confusion from arising in the case of beer sold in barrels, unless the word "Nicholson" had become obliterated. In the case of beer sold in bottles, however, the word "Nicholson" might, perhaps, be taken as indicating the name of the bottler.

It appears, moreover, that to some extent both the bitter beer of Messrs. Nicholson and that of Messrs. Bass are referred to by the public who are interested in such beers as dealers or consumers as "Triangle," and though up to the present time it does not appear that there has been any confusion caused by this practice such as it is, the practice may increase. In these circumstances I do not think that it would be right to allow the registration of Messrs. Nicholson's mark if it were a new one which they were proposing to use for the first time. It is, however, in the judgment that I have formed, a mark that was in use before August 13, 1875. If and so far as it is calculated to deceive, it is so merely because of some similarity to the registered trade marks of Messrs. Bass. No one could suggest that it would be calculated to deceive if Messrs. Bass's marks had never existed. In these circumstances it appears to me that to refuse to allow registration of the mark is to disregard entirely the exception contained in s. 19 of the Act in favour of marks in use before August 13, 1875. For myself, and with great deference to Farwell J., who took a different view, I can only read that section as providing by implication that in the case of such a mark, it may be registered notwithstanding that, by reason of its similarity to a mark already registered, it is calculated to deceive. It in effect excepts such a mark from the operation of s. 11. Such a construction of the section seems to be consistent with and to carry into effect the intention of the Legislature shown throughout the Trade Marks Acts, that the rights of proprietors of marks existing at the date of the coming into effect of the Trade Marks Act of 1875 should not be prejudiced.

In my opinion, the learned Assistant Comptroller arrived at a right conclusion upon the application for registration of Messrs. Nicholson's mark.

It necessarily follows from what I have already said that he was, in my opinion, also right in acceding to their application for rectification of the register by the removal of the word "Triangle." If, as I hold to be the fact, Messrs. Nicholson had been using their triangle mark as a trade mark for some sixty-one years, it obviously was wrong to allow Messrs. Bass to register the word "Triangle."

In my opinion, the appeals should be allowed with costs here and below.

Appeals allowed.

Feb. 16. A substantive application by leave of the Court was now made on behalf of Messrs. Bass, that in addition to the limitation imposed by the Assistant Comptroller on the user by the appellants of their trade mark the further restriction should be imposed—namely, that the mark should be used only on casks and barrels.

Sir Duncan Kerly K.C. and *R. E. Burrell* for the application. The applicants ask that the mark shall be registered not only with the Assistant Comptroller's limitation, but with the further limitation that it should be used only on barrels and casks. It is in respect of beer in barrels that the mark has been used in the past, and if applied to bottles of beer the risk of confusion with Bass's red triangle will be greatly increased. The power to limit is contained in s. 12, sub-s. 2, of the Act of 1905, which provides : that registration may be allowed "absolutely or subject to conditions, amendments, or modifications." Sect. 2, sub-s. 2, of the Trade Marks Act, 1919, provides that there may be limitations imposed on registration "as to mode or place of user or otherwise." The Court has therefore full jurisdiction to impose limitations. In *In re Whiteley's Trade Mark* (1) Jessel M.R. limited the user by the proprietor his trade mark to user "in manner only in which he had been accustomed to use it" : see also *In re Sykes & Co.'s Trade Marks.* (2)

[LAWRENCE L.J. The latter was a very special case.]

There is not so much risk of deception where the mark is put on barrels in which the beer is sold direct to customers as where it is sold to bottling trade. If the goods are sold, as they will be, in casks mainly, if not entirely, by Nicholsons, the risk of deception is extremely small considering the persons with whom they are dealing and from whom they are got. But if this beer goes out to bottlers they will bottle it and put Nicholsons' mark on it because it is Nicholsons' beer. If therefore it is open to Nicholsons to use their mark on bottles there will be confusion. They are not entitled to introduce a new user of their mark which will appeal to a new class of customers.

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(1) (1879) 43 L. T. 627*n*.

(2) (1880) 43 L. T. 626.

If therefore the risk of confusion can be obviated or restricted by conditions without restricting the continuance of the old user, in the case of an old mark, then such conditions ought to be imposed." That it is submitted is the principle established by *In re Whiteley's Trade Mark* (1) and by *Eno* v. *Dunn.* (2)

Trevor Watson K.C. and *Kenneth Swan* for the respondents were not called upon to argue.

LORD HANWORTH M.R. The Court is divided upon this application. Speaking for myself, I should be ready to impose a limitation, because I am still of opinion that within the meaning of the section the mark would be calculated to deceive. There is power, as Sir Duncan Kerly has pointed out, whether originally upon the registration by the Registrar or upon an appeal, to impose certain conditions, and those conditions may be imposed in respect of certain matters, and I think that one of the matters that ought to be taken into account is the possibility of deception.

The difficulty suggested in this case is that if you impose the condition that the trade mark should only be used in respect of bitter beer in barrels you are dealing not with the goods but with the container of the goods. For myself, I think a condition may be imposed in respect of the description of the goods, and part of the description is the inherent quality of the goods that are contained in a cask or in a barrel. You must have liquid in some container. There is a great deal of difference between bottled beer and beer in casks or barrels, and it is not merely a difference in the quality of the beer within those two containers, but it is something which applies to the very description of the goods. I think if a person said he sold only beer in barrels it might be quite a distinctive business from selling bottled beers. For my part, therefore, I see no difficulty in imposing a condition which would be effective and which would restrict the user of Messrs. Nicholson's mark to the actual mark upon which they relied, and which is referred to abundantly in the judgments—namely, the mark which is composed of the integers, one the portion which is derived from the stencil and the other the portion which is derived from the branded mark on the cask.

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(1) 43 L. T. 627*n*.

(2) 15 App. Cas. 252.

My judgment differs from the judgment of my learned Brothers, and the basis therefore on which I approach this application is different from the basis on which it is approached by them. They take a view which is different from my view, and, I think, necessarily different, because they took a different view in the substantive appeal.

I have only said this in order that it may not be supposed that the Court did not consider Sir Duncan Kerly's application, and also perhaps it is right that one should reveal the fact that the Court is still divided, as it was on the substantive matter in respect of this application.

The application is therefore refused, and must, as it is a substantive application, be refused with costs.

LAWRENCE L.J. In my opinion the Assistant Comptroller came to the right conclusion in refusing to limit the user of the mark to a user upon casks, and was right in limiting the user of the mark to the colours to which he has limited it. With that limitation, I think, as expressed in my judgment, there is no risk of confusion. It must be borne in mind that this was an old mark used for ten years before 1875, and has been continuously used ever since to denote a certain quality of the goods of Messrs. Nicholson. I see no ground in such a case for limiting the user of that mark to a particular form of container. It is intended to denote a liquid which must be marketed in some vehicle, and the trade mark must be applied to that vehicle. When once the right of the proprietor of the trade mark to use his trade mark to describe the quality of his beer has been established it does not seem to me to be right to prevent him from applying it to a container common to the trade such as a bottle.

For these reasons I think the application of Sir Duncan Kerly to limit the user of the trade mark to casks is one that ought not to be acceded to.

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NICHOLSON & SONS' APPLICATION, *In re.*
BASS, RATCLIFF AND GRETTON'S TRADE MARK, *In re.*

ROMER L.J. We have not heard Mr. Trevor Watson, but as at present advised I am not prepared to dissent from the general proposition that was advanced by Sir Duncan Kerly. But in the present case it appears to me that the conditions he asks us to impose in addition to the conditions that the Assistant Comptroller has already intimated an intention of imposing are so drastic that they ought not to be imposed unless a very much stronger risk of deception exists than appears to me to exist here. I am not satisfied that the risk of deception—although I agree there is some—is so great as to warrant the imposition of the further conditions which Sir Duncan Kerly has asked us to impose.

Application refused.

Solicitors: *Stephenson, Harwood & Tatham; McKenna & Co.*

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In re PRINCE BLÜCHER.

Ex parte DEBTOR.

[331 of 1930.]

Bankruptcy—Scheme of Composition—Proposal for Scheme—Inability of Debtor to sign—Signature by Debtor's Solicitors—Sufficiency of Signature —" Signed by him "—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 16, *sub-s.* 1.

By s. 16, sub-s. 1, of the Bankruptcy Act, 1914, where a debtor intends to make a proposal for a scheme of composition in satisfaction of his debts, he shall within the time thereby limited lodge with the Official Receiver " a proposal in writing signed by him " embodying the terms of the scheme of composition which he is desirous of submitting for the consideration of his creditors.

At a meeting of creditors of a debtor against whom a receiving order had been made a proposal for a scheme of composition was submitted on behalf of the debtor. The proposal was not signed by the debtor himself but by his solicitors. On behalf of the debtor a certificate by an eminent physician was exhibited to an affidavit, in which it was stated that the debtor was " still so seriously ill as to make it quite impossible for him to discuss any matters of business, and that any attempt to

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explain to him business details or proceedings would have a serious and possibly a fatal effect upon him" :—

Held, affirming the decision of the Registrar, that no proposal for a composition had been lodged by the debtor within s. 16, sub-s. 1, of the Act; that the words "signed by him" were explicit; and that there was no ground for altering the words of the statute or giving to the statute a judicial interpretation which would in effect be an amendment or alteration of its plain terms.

In re Whitley Partners, Ld. (1886) 32 Ch. D. 337; *Hyde* v. *Johnson* (1836) 2 Bing. N. C. 776 applied.

APPEAL from a decision of Mr. Registrar Mellor.

On March 14, 1930, a receiving order was made against debtor. On March 28 a first meeting of the debtor's creditors was held, which was adjourned from time to time. On July 30 a proposal for a scheme of composition was filed and signed on behalf of the debtor by his solicitors. Objection was taken by the Official Receiver that the proposal was not signed by the debtor personally, as required by s. 16, sub-s. 1, of the Bankruptcy Act, 1914, which provided that when any such proposal for a scheme was submitted the debtor must "lodge with the Official Receiver a proposal in writing signed by him embodying the terms of the composition or scheme." On behalf of the debtor a certificate of an eminent physician was exhibited to an affidavit, in which it was stated that the debtor was "still so seriously ill as to make it quite impossible for him to discuss or properly appreciate any matters of business, and that any attempt to explain to him business details or proceedings concerning his affairs would have a serious and possibly a fatal effect upon him."

On July 18, 1930, the Registrar held that there was no proposal for a composition lodged by the debtor within s. 16, sub-s. 1, of the Act, and therefore that the Official Receiver was under no obligation to hold a meeting of creditors as prescribed by the section.

The debtor appealed, and by his notice of appeal asked that the Registrar's order might be discharged, rescinded or varied, and that a declaration might be made that the proposal for a composition lodged by the debtor was in accordance with the intention of the section.

Tindale Davis for the debtor. The sole question in this case is whether s. 16, sub-s. 1, of the Bankruptcy Act, 1914, is satisfied if the proposal for a scheme is signed on behalf of the debtor. "Signed by him," it is submitted, means signed by his authority. Sect. 112 of the Act provides that in the case of a debtor who has died proceedings may be continued as if he were alive. Sect. 149 provides that a lunatic may act by his committee or curator bonis. It cannot, it is submitted, have been intended that a debtor who is as ill as the debtor in the present case should be in a worse position than a debtor who has died or is a lunatic. In *In re Walker* (1), where this section was applied, Grantham J. stated that the offer of a scheme might be made by the representatives of a deceased debtor. The judge must therefore have considered that personal signature was not necessary.

[LORD HANWORTH M.R. It is quite obvious that that passage is obiter.]

The Act cannot, it is submitted, have contemplated the position of a debtor who could not sign, as, for example, a debtor who is paralyzed. It would be absurd in such a case if a scheme approved by all the creditors had to be rejected because of the physical inability of the debtor to sign. Some latitude must therefore be allowed in interpreting the words "signed by him." Those words it is submitted do not mean that the proposal must be actually signed by the debtor himself, but that it will be sufficient if it is signed by somebody authorized by him.

Roland Burrows (*Sir William Jowitt A.-G.* with him) for the Official Receiver were not called upon to argue.

LORD HANWORTH M.R. The short point which we have to determine on this appeal is whether or not for the purposes of s. 16 of the Bankruptcy Act, 1914, which deals with a composition or scheme of arrangment, it is possible to accept a proposal for a scheme which has been signed on behalf of the debtor by solicitors.

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(1) (1886) 3 Morr. 69, 73.

What happened in this case was this. The debtor is unfortunately ill, and not only ill, but has been for some time extremely ill, and we have before us a certificate properly verified by the affidavit of a solicitor that this debtor is in such a condition of health that he is quite unable to attend to any business, and certainly quite unable to sign any documents. Of course, we accept the certificate, which is signed by a very distinguished physician and identified by the solicitor acting for the debtor. In these circumstances it was desired to put forward a proposal for a scheme of composition, and a well known firm of solicitors signed that proposal. They put forward a proposal, which says: "I . . . . the above-named debtor hereby submit the following proposal for a composition in satisfaction of my debts," and the scheme is set out, and it is dated July 3, 1930, and signed by Messrs. Burch & Co., of Bolton Street, Piccadilly, whose signature, of course, would carry weight. But objection is taken that that proposal for the scheme does not comply with the terms of s. 16 of the Act. Sect. 16, sub-s. 1, runs in this way: "Where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors."

We have to determine whether or not those specific words "signed by him" cover and authorize a signature by the debtor's solicitor. It has been argued by Mr. Tindale Davis with great lucidity that it ought to be so held, and particularly because, if the signature of the solicitor on behalf of the debtor is not accepted, the debtor is really debarred by his unfortunate and serious illness from taking advantage of s. 16. Attention is called to a provision which is made by s. 112. In the case of the death of a debtor s. 112 says that the matter shall continue as if he were alive; and attention

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is also called to s. 149, which says: "For all or any of the purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or curator bonis." Mr. Tindale Davis put interrogatively this question: If provision is made for the case of a debtor who dies, if a committee may sign on behalf of a lunatic, if a firm may sign by any of its members, surely it cannot be intended that a debtor who lies on a sick bed is to be debarred by the terms of s. 16, strictly construed, from exercising rights which apparently would enure in favour of a lunatic or in the case of a dead man?

All that may be very good matter for considering whether an amendment of the Act should be made. We have to consider the explicit and very simple terms of the statute. The words of the statute are "signed by him." Where a statute intends that the authorization may be by a person on behalf of a debtor the Legislature knows how to provide for it. To go back to s. 4 of the Statute of Frauds, the words there require that a contract relating to the sale of lands shall be in writing and signed by the party who is to be charged therewith, and the words used are: "and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." Those additional words "or some other person thereunto by him lawfully authorised" are significantly absent from this statute. In *Hyde* v. *Johnson* (1) the question arose whether or not Lord Tenterden's Act applied in the case of a signature otherwise than by a person who gave the undertaking, and Tindal C.J. said: "The short question in this case is, whether a letter offering to pay a debt by instalments written by the defendant's wife to the plaintiff in her husband's name, and at his request, and afterwards sent by him to the plaintiff, is a sufficient acknowledgment or promise 'made or contained by or in some writing, signed by the party chargeable thereby,' within the meaning of 9 Geo. 4, c. 14, s. 1. The question turns entirely on the construction of the statute, and it amounts, in other words to this,—does the statute 9 Geo. 4, c. 14, extend to a writing signed by an agent of the party, or is it confined to a writing signed by the party himself? Looking at the words of the statute, it is confined in terms to a writing 'signed by the party chargeable thereby.'" In *In re Whitley Partners, Ld.* (1), Bowen L.J. affirmed and followed the decision in *Hyde* v. *Johnson.* (2) He said: "*Hyde* v. *Johnson* (2) was decided on the ground that Lord Tenterden's Act was to be read along with the Statute of Frauds, which expressly refers to signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present statute there is nothing in the way in which the memorandum of association is dealt with to shew that the Legislature intended anything special as to the mode of signature." It is otherwise in the present statute. We have the specific words "signed by him," and following the reasoning which is derived from a consideration of the terms of the Statute of Frauds, and the two cases to which I have referred, I think there is no ground for altering the words of the statute or giving a judicial interpretation to it, which would, in effect, be an amendment or alteration of the plain terms of the statute. It may or may not be unfortunate that a sick man cannot take advantage of s. 16; it may be, I do not say that it is, that he is therefore placed in a position less advantageous than a lunatic, but the Legislature has not made provision for some person to act on his behalf, and we must adhere to the terms of the statute.

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(1) 2 Bing. N. C. 776, 778.

In these circumstances the decision of the Registrar was right, and the appeal must be dismissed with costs.

SLESSER L.J. I agree. Mr. Tindale Davis's argument amounts to this, that some injustice or inconvenience would arise in the circumstances of the case if some one other than the debtor were prevented from signing on his behalf. But it was laid down many years ago, and was followed in *Warburton*

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(1) 32 Ch. D. 337, 341.

(2) 2 Bing. N. C. 776.

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v. *Loveland* (1) that: "Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature." I find myself quite unable to think here that the words are other than explicit. The language of the statute is "signed by him," and as my Lord has pointed out in considering very similar words in a writing or letter of acknowledgment under Lord Tenterden's Act, it was held by the Court that the words "signed by him" could not be extended to signed by an agent or some other person on behalf of the required signatory. Other statutes than the Statutes of Frauds contain specific provisions where it is required that an agent may sign on behalf of a sick person. Under the Bills of Exchange Act, 1882, by s. 91, sub-s. 1, it is provided specifically: "Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority." In the present case it is clear that no such permission is given directly or can properly be read into the language of the statute. I think that the words are clear and explicit, and that the intention of the Legislature is so expressed that the signing must be by the debtor, and as the debtor here for some reason or other is unable to sign, it follows he is unable to avail himself of the benefits of the section. I therefore agree that the appeal should be dismissed.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Burch & Co.*
Solicitor for respondent: *Solicitor to Board of Trade.*

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(1) (1832) 2 Dow & Cl. 480, 489.

W. I. C.

Considered. *Re* WELLSTED'S WILL TRUSTS. [1948] 2 All E.R. 209.

Distinguished. *Re* SHAW'S AND *Re* WISELY'S SETTLEMENT TRUSTS. [1951] 1 All E.R. 656.

In re STIMPSON'S TRUSTS.

STIMPSON *v.* STIMPSON.

[1930. S. 1356.]

LUXMOORE J.

1930 *Oct.* 17, 21.

1931 *Feb.* 16.

Settlement—Land settled on Trust for Sale—Capital Money—Reversioner—Statutory Power of Advancement—Consent of Tenant for Life—Forfeiture of protected Life Interest—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Trustees of a will held land upon trust for sale and the proceeds of sale were not subject to any trust for reconversion under the will:—

Held, that they were entitled to exercise the power of advancement out of capital conferred upon them by s. 32 of the Trustee Act, 1925, in favour of a remainderman, subject to the consent of the tenant for life, whose life interest was protected against assignment.

Held, further, that the tenant for life by consenting to the exercise of the power of advancement forfeited his life interest under the will.

ORIGINATING SUMMONS.

By a settlement dated June 27, 1874, and made between Thomas Stimpson and Mary his wife of the one part and Ben Walker and John Burns of the other part certain freehold and leasehold hereditaments in Yorkshire were conveyed to the said Ben Walker and John Burns upon trust to pay the income thereof to the said Mary Stimpson for her life and after her death upon trust for the said Thomas Stimpson if he should survive his wife during the remainder of his life and after the death of the survivor upon trust for such persons or person and for such intents and purposes as Mary Stimpson (notwithstanding her marriage) should by her will appoint with a gift over to the children and remoter issue of Thomas and Mary Stimpson in default of appointment.

Thomas Stimpson died on August 7, 1904. Mary Stimpson by her will dated August 18, 1906, appointed the defendant J. T. Dodsworth to be the sole executor and trustee thereof, and after reciting the 1874 settlement and her general power of appointment thereunder, in exercise thereof appointed that all the real and leasehold estate conveyed and assigned by the settlement or the purchase money thereof, if sold, or the investments for the time being representing the same, should be held by the trustees or trustee for the time being of the 1874 settlement upon trust for sale as therein mentioned, and to stand possessed of the proceeds of such sale upon trust for investment in securities authorized by law for the investment of trust funds and to pay the dividends and income thereof to her son the plaintiff Llewellyn Stimpson during his life subject to the proviso thereinafter contained, and after his death upon trust for all his children who should attain the age of twenty-one years, or being daughters should marry, in equal shares, with a gift over in case the plaintiff should die without leaving issue. And the testatrix provided and declared that if the plaintiff should assign or charge the life interests given to him by her will or any part thereof, or become bankrupt or do or suffer any other act or thing whereby the said life interests or either of them if payable to him absolutely or any part thereof would become vested in or payable to any other person, then the trusts declared in his favour should cease and determine and the trustees of the respective trust funds should thenceforth during his life apply the income thereof upon the usual discretionary trusts in favour of the plaintiff and his issue. The testatrix gave all the residue of her estate to the plaintiff absolutely. The will contained no power of advancement.

Mary Stimpson died on February 24, 1929, and her will together with a codicil not material to the present case was proved by the defendant Dodsworth in the principal Probate Registry on May 7, 1930.

None of the freehold and leasehold property comprised in the 1874 settlement had been sold, and the gross income of the property was about 69*l.* per annum.

The plaintiff had been married once only, and his wife was still living. The defendant T. E. Stimpson was the only child of the marriage, and was now twenty-three years of age.

It was desired that an advancement of 300*l.* to 350*l.* out of the property subject to the 1874 settlement should be made to the defendant Stimpson, and the summons was accordingly issued to determine whether this advancement could be made in the manner and subject to the conditions contained in s. 32 of the Trustee Act, 1925, and secondly, whether if the plaintiff as tenant for life consented to the exercise by himself as sole trustee of the 1874 settlement of the statutory power of advancement he would by so doing incur a forfeiture of his life interest under the will of Mary Stimpson.

On the first hearing of the summons Luxmoore J. decided that the plaintiff, if he exercised any such power of advancement, would under the will of Mary Stimpson forfeit his life interest in the property. The summons then stood over to enable the plaintiff to consider the position, and he now agreed to consent to the advancement whether his life interest was forfeited or not. The question was then argued whether s. 32 of the Trustee Act, 1925, applied to the case. (1)

C. R. R. Romer for the plaintiff. The plaintiff having consented, as tenant for life, to the exercise of the statutory power of advancement the only question is whether the present case comes within the section, as the trust property is land still unsold. A doubt has been suggested in the notes to sub-s. 2 in Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., p. 399.

R. F. Roxburgh for the defendant T. E. Stimpson. It is submitted that the note in Wolstenholme and Cherry is incorrect. The Law of Property Act, 1925, s. 28, does not make proceeds of sale of land capital money for the purposes

(1) Trustee Act, 1925, s. 32: (1.) "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or remainder or reversion, ... Provided that .... (*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

(2.) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925."

of the Settled Land Act, for if it did it would make such proceeds of sale devolve as land. The object of that section is to give the trustees of land held upon trust for sale all the powers of a tenant for life under the Settled Land Act, 1925: see Settled Land Act, 1925, s. 75. Capital money under the Settled Land Act, 1925, may be treated as if it were money representing proceeds of sale, but this does not involve treating proceeds of sales as if they were capital money for the purposes of devolution.

W. F. Waite for the defendant J. T. Dodsworth.

LUXMOORE J. The question I have to determine is, whether the proceeds of the sale of land which is held on trust for sale are applicable for the advancement of a beneficiary under s. 32 of the Trustee Act, 1925.

I need not state the actual facts with regard to the property, because it is admitted that in the events that have happened the plaintiff holds on trust for sale certain freehold and leasehold property under a settlement dated June 27, 1874, and under the trusts of the will of Mrs. Mary Stimpson, dated August 18, 1906. The plaintiff is the sole trustee under the settlement and also the tenant for life. The first defendant Thomas Edwin Stimpson is a son of the plaintiff. He is now aged twenty-three, and is interested in the trust property.

The summons, in addition to asking whether the power of advancement of the defendant Thomas Edwin Stimpson is applicable in the manner provided by and subject to the conditions contained in s. 32 of the Trustee Act, 1925, also asks a further question, whether, on the true construction of the will of Mary Stimpson, in the event of the plaintiff consenting to any advancement being made to the son, he forfeits his life interest. The matter came before me on October 21 last, and I then decided that if this consent was given it would in fact bring about a forfeiture of the life interest of the plaintiff.

The summons stood over in order to enable the plaintiff Llewellyn Stimpson to consider the position, and he has now agreed to consent to the advancement, whether his life interest is forfeited or not, and he asks the Court to make the advancement in favour of the first defendant.

The question therefore arises whether s. 32 of the Trustee Act, 1925, applies. That section provides as follows: "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs." Then there is a proviso which, so far as is material, is as follows: "Provided that . . . . (*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application." No difficulty arises with regard to this proviso, for the plaintiff Mr. Llewellyn Stimpson has agreed to consent to the advancement in favour of the first defendant whether his (Mr. Llewellyn Stimpson's) life interest is forfeited or not. Then sub-s. 2 provides: "This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925."

It is therefore necessary in the case of property held on trust for sale to consider whether or not the proceeds of such sale are by statute or in equity to be considered as land or applicable as capital money for the purposes of the Settled Land Act, 1925. It is difficult to understand exactly what the sub-section is aimed at. There is, so far as I am aware, no statute which provides that the proceeds of sale of property held on trust for sale are to be considered as land, and certainly there is no rule in equity to that effect. The rule is entirely to the contrary. The only suggestion that has been made by counsel is that the reference in the sub-section to statute is a reference either to s. 28 of the Law of Property Act, 1925, or to s. 75 of the Settled Land Act, 1925. Sect. 28 of the Law of Property Act provides that: "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority:" Pausing there, all it comes to is that trustees for sale have the right to exercise certain powers under the Settled Land Act, 1925. Then—leaving out the interpolation contained in the Schedule to the Law of Property (Amendment) Act, 1926, which is not material for the purposes of my judgment—the section proceeds: "and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorized by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale."

The section does not provide that the money arising under a trust for sale is to be considered as money applicable under the Settled Land Act, 1925, or anything of the kind; all it provides is that capital money arising under the powers conferred on the trustees by that section shall, unless paid or applied for any purpose authorized by the Settled Land Act, be "applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale" —thus drawing a clear distinction between money arising under a trust for sale and money arising under the exercise of the powers conferred on the trustees by that section. To my mind it is impossible to hold under s. 28 of the Law of Property Act, 1925, that in the case of land which is subject to a trust for sale the proceeds are by statute to be considered as applicable as land. Sub-s. 5 of s. 75 of the Settled Land Act, 1925, is as follows: "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." That again only refers to capital money arising under the Settled Land Act, 1925, and does not apply in any way—or at least I can find nothing in any section to suggest that it applies—to money arising under a trust for sale.

The difficulty in sub-s. 2 of s. 32 of the Trustee Act, 1925, is to appreciate exactly the significance of the last words in the sub-section "applicable as capital money for the purposes of the Settled Land Act, 1925." It may be that these words refer to the other subject-matter of the section—namely, money or securities, for in some circumstances such money or securities may be applicable as capital money for the purposes of the Settled Land Act, 1925, but whether this be so or not, in my opinion these words have no reference to land held on trust for sale.

In my view s. 32 applies in a case like the present where the property is held on a plain trust for sale, and I have no doubt that in the events which have happened the trustee is entitled to make an advancement for the benefit of the defendant Thomas Edwin Stimpson.

Solicitors for all parties: *Bell, Brodrick & Gray, for Richardson & French, Thirsk.*

A. R. T.

FARWELL
J.

1931

March 3, 4,
5, 6, 10, 11,
12, 13, 17,
18, 19, 20,
24, 25, 26,
27, 30.

NICHOLLS *v.* ELY BEET SUGAR FACTORY.

[1929. N. 1169.]

Several Fishery—Action for Pollution—Damage to Fish—Possessory Title—Defendant's Right to set up jus tertii.

In an action of trespass a defendant cannot set up a jus tertii against a possessory title.

The same rule applies to an action for polluting a several fishery and damaging the fish.

Fitzgerald v. *Firbank* [1897] 2 Ch. 96 explained and applied.

Whether the rule applies to every kind of nuisance action, *quaere.*

WITNESS ACTION.

The plaintiff was the owner in possession of two several fisheries in the Ouse, Cambridgeshire. The Littleport Fishery commenced at Littleport Bridge, 4½ miles below Ely, and extended some 3 miles to Brandon Creek. The Southery Fishery commenced at Brandon Creek, and extended about another 3 miles to Modney Drove.

In 1909 the plaintiff having paid 35*l.* to an angling society for an assignment of a 1905 lease of the Littleport Fishery, bought the reversion from the lessor Eaden for 105*l.* From 1902 to 1919 the plaintiff rented the Southery Fishery from Ellison's predecessor in title under a parol agreement at 24*l.* a year, and then purchased it from Ellison for 200*l.* His acts of ownership included fishing by himself or his friends, granting of fishing leases, payment of rates, and prosecution of poachers. His right had never been disputed.

About the end of September, 1925, the defendants, a company incorporated in 1924 and subsidised for that purpose, began to manufacture beet sugar at their factory at Ely. The manufacturing period, called a campaign, lasts from the end of September to the middle of January in each year.

No complaint was made as to the 1925, 1926, or 1927 campaigns, but in the 1928 campaign the pollution from the factory effluents was so great that it reached the plaintiff's fisheries and killed his fish.

On August 2, 1929, after an abortive remonstrance, the plaintiff commenced this action for an injunction and damages.

The defendants did not admit the pollution, denied their responsibility for it if it existed, and paid 75*l.* into Court in satisfaction of the claim. In addition to that they sought to put the plaintiff's title in issue. They alleged that this part of the Ouse was tidal before 1650, and therefore the several fisheries could only have been created by a Crown grant before Magna Carta, which the plaintiff must prove.

Before the 1930 campaign the defendants installed new apparatus at a cost of 25,000*l.*, and during that campaign, apart from accident or breakdown in the apparatus, the nuisance had practically ceased. But it was impossible to say that all risk of pollution had been eliminated.

The case lasted for sixteen days, when judgment was reserved. It is reported only on the question whether the rule forbidding a defendant in an action of trespass to set up a jus tertii against the plaintiff's possessory title applies to an action for polluting a several fishery.

Gover K.C., *Stuart Moore* and *A. W. Elkin* for the plaintiff. The plaintiff can maintain this action as owner in possession. If it were an action of trespass the defendants could clearly not set up a jus tertii against his possessory title. The same rule applies to an action for polluting a several fishery: *Fitzgerald* v. *Firbank.* (1)

Morton K.C. and *Daynes K.C.* for the defendants. In that case Kekewich J. thought that a possessory right was sufficient to maintain an action "in the nature of trespass." But this point was not taken or discussed in the Court of Appeal.

[FARWELL J. This rather crucial point was obviously before them, and they would hardly have affirmed the judgment if they thought the decision on that point wrong.]

Cur. adv. vult.

March 30. FARWELL J. [after stating the facts and holding that the nuisance during the 1928 and 1929 campaigns had been fully proved, and although it was very much diminished in the 1930 campaign some risk still remained, continued :] I must now deal with the plaintiff's right to maintain this action. That is largely a question of law. I find as a fact that the plaintiff is and has at all material times been in possession of these two several fisheries, under what appears to be a good title from the apparent owners. He brings this action accordingly. Is it open to the defendants to put his title in issue, if by so doing they are only setting up a jus tertii ?

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(1) [1897] 2 Ch. 96.

It is well settled that in an action of trespass a defendant may not set up a jus tertii. He may set up a title in himself, or show that he acted on the authority of the real owner, but he cannot set up a mere jus tertii. That is well settled, and was not seriously disputed.

In the present case the defendants could not set up that their acts were authorized by the real owner, because the acts of polluting the river were illegal per se under the Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75), and the Salmon and Freshwater Fisheries Act, 1923 (13 & 14 Geo. 5, c. 16).

The defendants however say that (*a*) they may set up a Crown title, and (*b*) the rule as to setting up a jus tertii is confined to trespass actions and does not apply to nuisance actions.

Now as to (*a*). If this were an action of trespass in my judgment the defendants could not set up a jus tertii in the Crown, unless they were claiming thereunder, e.g., as members of the public, in which case they would be asserting their own title. Decision of the question in whom the title was, would not decide possession. The defendants would not be entitled to set up the title of a third person at all.

But (*b*) raises a more difficult question. Is this an action of trespass, and if not, does the jus tertii rule apply to an action of nuisance ? Now this is not strictly speaking an action of trespass. In the old days it would have been trespass on the case. (1) The defendants are not discharging anything directly on to the plaintiff's property, but on to an intermediate property, and the discharge is carried down to the plaintiff's property. That is not strictly speaking trespass. It is nuisance.

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(1) See [1931] 1 K. B. 153*n*.

Now does the jus tertii rule apply to such an action? I must confine my remarks most strictly to actions of the kind before me. There are many kinds of nuisance actions, e.g., an action for infringement of ancient lights, and so on, and I am very far from saying that the jus tertii rule applies to every kind of nuisance action. But in this case I am dealing with a nuisance action of a kind peculiar to itself and to other pollution actions. It is not trespass, but it is very analogous to trespass. In my judgment where defendants are doing acts per se illegal, and therefore not justifiable under any outside authority, they cannot set up a jus tertii as a defence in an action of this kind.

That in my judgment is really decided by the Court of Appeal in *Fitzgerald* v. *Firbank*. (1) The plaintiffs were the lessees in possession of a several fishery in the Colne under a lease of 1891. The defendant discharged water loaded with sediment into the Chess, which carried the sediment to the Colne, the effect being to drive away the fish and injure the breeding. The plaintiffs brought an action for an injunction and damages. The defendant by his defence (inter alia) sought to put in issue the plaintiffs' title to the fishery, and claimed that the plaintiffs had no title to maintain the action. On this point Kekewich J. said (2): "I should have thought, without argument, ... that this would fall within the principle that a possessory right was sufficient to constitute a title to maintain an action in the nature of trespass. I am not pressed with that objection to the plaintiffs' action."

Holding therefore that the action was an action not strictly of trespass but in the nature of trespass, he did not go into the plaintiffs' title, but said that possession was enough, and granted the plaintiffs relief.

In the Court of Appeal the defendant took a different point, suggesting that the plaintiffs had a right to catch fish, but no right to take them away. The question of the plaintiffs' title does not appear to have been expressly raised in the

(1) [1897] 2 Ch. 96.

(2) [1897] 2 Ch. 97.

Court of Appeal, who affirmed the decision of Kekewich J., but it is impossible to suppose that the preliminary question as to the plaintiffs' right to sue was not present to the Court. With Kekewich J.'s decision before them on that very question, I cannot believe that they would have affirmed his judgment if they had any doubt that he was right on that question. They dealt with the case on the footing that possession was enough.

Lindley L.J. said (1) that the right was a profit à prendre, and a person enjoying that right "has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights. . . . . Again, if he has a possessory right, ... he can be said to have the use and occupation of the right. . . . . This is a somewhat unusual case, and I am not aware of any precedent for what I may describe as an action of nuisance by the owner of a sole and exclusive right of fishery. But once grant that the owner of such a right can sue in trespass for one kind of infringement of it, I cannot see why he might not maintain an action on the case for nuisance at common law for such an interference with his right as is proved in this case."

Lopes L.J., after holding that the defendant had curtailed the right to which the plaintiffs were entitled, said (2): "If that is the case, it is perfectly clear that there is a right of action in the plaintiffs, and that the judgment of the learned judge in the Court below who so held is perfectly right."

Rigby L.J. said (3): "I hold that the [lessees] of the incorporeal hereditament have a right of action against any person who disturbs them either by trespass or by nuisance, or in any other substantial manner."

The result is this. The Lords Justices pointed out that the action strictly speaking was an action of nuisance, but accepted Kekewich J.'s view that in an action of the particular kind before them possession was enough to enable the plaintiffs to sue. That decision binds me, and even if I did not agree with it, as I do, I should be bound to hold

(1) [1897] 2 Ch. 101, 102.
(2) [1897] 2 Ch. 103.
(3) [1897] 2 Ch. 104.

that in this particular case the defendants were not entitled to set up a jus tertii.

If that is right, there is an end of this part of the case, but as the whole question of the title has been gone into and the case may go further, it is best, I think, not to dispose of it on this point alone.

[His Lordship then considered the defendants' evidence as to the tidality of this part of the Ouse in 1650, and held that it was wholly insufficient. Even assuming it was tidal then, the fisheries had always been dealt with as part and parcel of the manors of Littleport and Southery, and were so mentioned in Domesday Book, and having regard to the difficulty of proving the old title at the present time, and to the fact that this was not a claim between two rival owners for the property in the fisheries, but a jus tertii defence set up to a pollution action, the plaintiff had shown a sufficient title to maintain the action.

As the defendants had largely minimized the nuisance and were making great efforts to eliminate it altogether, and the next twelve months would show whether they had succeeded, his Lordship did not grant an immediate injunction, but made a declaration as to the plaintiff's right to maintain the action, and gave him liberty to apply for an injunction on two days' notice during the next twelve months if the damage to the fish recurred. He assessed the plaintiff's damages at 200*l.*, and having regard to the complexity of the ancient title, put in issue by the defendants, he allowed the plaintiff his three counsel. The defendants must pay the costs.]

Solicitors: *Hutchinson, Sons & Gomm; Morris, Ward-Jones, Kennett & Co.*

G. R. A.

C. A.
1930
LUXMOORE J.
Nov. 18, 28.
C. A.
1931
Jan. 12.

COUSINS *v.* INTERNATIONAL BRICK COMPANY, LIMITED.

[1930. C. 4389.]

Company—Shareholder—Voting—Proxy Given—Proxy not properly Revoked—Right of Shareholder to attend Meeting and Vote in Person—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 20.

A company's articles of association provided (article 74), that votes might be given personally or by proxy; (article 75) that the instrument appointing a proxy should be deposited at the office not less than forty-eight hours before the time of holding the meeting at which it was to be used; and (article 76) that "a vote given in accordance with the terms of an instrument of proxy will be valid notwithstanding the previous . . . . revocation of the proxy . . . . provided no intimation in writing of the . . . . revocation . . . . shall have been received at the office before the meeting":—

Held (affirming the decision of Luxmoore J.) that in a case where a proxy had not been validly revoked in accordance with article 76, the shareholder who had given the proxy was free to attend at the meeting and vote personally; and that, when he had done this, the vote tendered by the proxy was properly rejected.

MOTION.

The International Brick Company, Ld., was incorporated under the Companies Acts in February, 1928, with a nominal capital of 200,000*l.*, divided into 150,000 cumulative preferred ordinary shares of 1*l.* each and 1,000,000 deferred shares of 1*s.* each.

The articles of association (so far as material) provided as follows:—

"71. Every member shall upon a show of hands have one vote and upon a poll one vote in respect of each preferred ordinary share and one vote in respect of each five deferred shares held by him."

"74. Votes may be given personally or by proxy . . . ."

"75. The instrument appointing a proxy, together with the power of attorney (if any) under which it is signed, shall be deposited at the office not less than forty-eight hours before the time for holding the meeting at which the person named in such instrument proposes to vote."

"76. A vote given in accordance with the terms of an instrument of proxy will be valid notwithstanding the previous death of the principal or revocation of the proxy or transfer of the share in respect of which the vote is given, provided no intimation in writing of the death, revocation or transfer shall have been received at the office before the meeting."

On October 10, 1930, the report of the company and its audited accounts were issued, together with a notice convening the second annual general meeting of the company for October 20, 1930. The report of the directors stated that under the articles of association the defendant C. W. R. Pantlin, the chairman of the company, retired and being eligible offered himself for re-election. The plaintiff Henry Cousins being desirous that Mr. Pantlin should not be re-elected, but that the plaintiff Henry George Talbot Carr should be elected a director in his stead, secured proxies in favour of the plaintiff Carr, representing 102,138 votes, and these proxies were duly lodged at the registered office of the company as required by article 75.

At the annual general meeting Mr. Pantlin took the chair, and after the report and accounts had been adopted, a resolution was proposed and seconded for Mr. Pantlin's re-election. The plaintiff Cousins proposed as an amendment the election of the plaintiff Carr and this was duly seconded. The chairman, however, refused to allow the amendment on the ground that the plaintiff Carr's consent to act as director was not in order. The resolution to re-elect the defendant Pantlin was then put to the meeting and declared carried on a show of hands. A poll was thereupon demanded and the meeting was adjourned till November 3.

As the result of proceedings an undertaking was given to put the amendment, proposing Mr. Carr, at the adjourned meeting. At the meeting Mr. Hopkins, another director, took the chair, and on the taking of the poll, Mr. Cousins, besides his own votes, which numbered 900, tendered the 102,138 votes for which he held proxies. Shareholders who were present and voted against the resolution represented 96,604 votes. The chairman announced that the number of votes cast for the amendment was 52,081 and against 96,604, and that the amendment was therefore defeated. The defendant Pantlin was then elected to be a director on a show of hands. The explanation of the chairman's announcement was that shareholders whose votes amounted to 11,396, had purported by notice in writing to revoke the proxies given to Mr. Cousins, and had voted personally against the amendment; that shareholders whose votes amounted to 36,991, had purported by notice in writing to revoke their proxies given to Mr. Cousins; and that shareholders whose votes amounted to 3700, had without giving notice to revoke their proxies voted personally at the meeting against the amendment. The proxies given by all the shareholders had therefore been rejected, and where shareholders who had given proxies had voted personally their personal votes were accepted. It was admitted that the notices purporting to withdraw proxies were all given between October 20 and November 3.

On November 6, 1930, the plaintiffs issued a writ claiming a declaration that upon the poll of the shareholders held upon November 3, 1930, votes tendered by the plaintiff Cousins as proxy had been wrongfully disallowed and that the plaintiff Carr was elected as a director in the place of the defendant Pantlin; an injunction restraining the defendant Pantlin from acting as a director of the defendant company and an injunction restraining the defendants from preventing or interfering with the plaintiff Carr's acting or attending as a director of the defendant company. On the same day notice of motion was issued claiming interim injunctions in the above terms.

R. J. Sutcliffe for the plaintiffs.
H. S. G. Buckmaster for the defendants

Luxmoore J. The plaintiffs by their writ in this action seek a declaration that upon the poll of the shareholders in the defendant company held upon November 3, 1930, as to the election of the plaintiff Carr as a director of the defendant company in place of the defendant Pantlin and as to the re-election of the defendant Pantlin, the defendants or one of them wrongfully rejected or disallowed votes tendered by the plaintiff Cousins as proxy for other shareholders and wrongfully received and counted votes in favour of the defendant Pantlin; that the said defendant Pantlin was not validly re-elected to be a director of the defendant company; and that the plaintiff Carr was elected as a director in place of the defendant Pantlin, and certain ancillary relief.

By the notice of motion they ask for an order that the defendant Pantlin be restrained from acting in any way as a director of the defendant company and that he may also be restrained from preventing or interfering with the plaintiff Carr acting or attending as a director of the defendant company.

The sole question to be determined on the motion and in the action is whether certain votes were properly rejected or improperly accepted on the taking of the poll referred to in the writ. There is no dispute with regard to the material facts. [His Lordship then stated the facts.] The plaintiff Cousins claims that the admission of the 11,396 votes as voting against the amendment, and the rejection of the proxies in respect of these 11,396 votes as well as those for the 36,991 votes, were respectively invalid and improper, and he further claims that if no improper admission or rejection had been made, the amendment would in fact have been carried. The answer to the question whether his claims are correct or not depends on the construction of the material articles contained in the company's articles of association. The material articles to consider are those which relate to the giving of proxies, and the user and revocation thereof, for it is admitted that the right to vote by proxy is a contractual right depending entirely on the terms of the contract conferring that right.

The articles relating to proxies are articles 74, 75 and 76. The first part of article 74 confers on the members the right to vote either personally or by proxy. The rest of that article deals with the form of proxy and the personality of the person who may be appointed. Nothing turns on this, for it is admitted that the proxies originally given to the plaintiff Cousins are unimpeachable in form. [His Lordship then read articles 75 and 76.] Now it is said that a proxy once given for a particular meeting cannot be revoked except by a notice in writing which is received at the office before the meeting; that the meeting of November 3 was an adjourned meeting, and therefore in law a continuation of the meeting of October 20, and that as none of the proxies given to the plaintiff Cousins were in fact revoked before the meeting of October 20, the plaintiff Cousins was entitled to use all of the proxies given to him, even if the members who had given such proxies attended the adjourned meeting and tendered their votes in person.

I accept the argument on behalf of the plaintiff that the 36,991 votes he tendered on behalf of those persons who had given in proxies but who did not tender their votes in person at the adjourned meeting ought to have been received on the poll of the chairman, for the purported revocation of these proxies was not in accordance with the provisions of the article 76. The precise case is covered by the decision of Russell J. in the case of *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (1908), *Ld.* (1), but this is not decisive of the plaintiff's case, for if these votes are admitted, but the 11,396 are refused, the voting in favour of the amendment would be 89,072, while the voting against it remains unchanged at 96,604.

It is essential therefore to consider the position with regard to the 11,396 votes. It is clear on the authority of the case to which I have already referred that the purported notices of revocation in respect of those votes were ineffective by themselves to prevent the plaintiff Cousins from using the votes concerned on the poll, and therefore the only question is as to the effect of the tender of these votes in person by the shareholders who executed the proxies. Is there anything in the articles as between a shareholder and the company to preclude a shareholder who has given a proxy from attending a meeting or an adjourned meeting and voting in person, notwithstanding the fact that he has given a proxy ? There is no authority touching the particular point, but on principle I do not think there is any ground in such a case for refusing the shareholder's vote and accepting that of the proxy. The proxy is merely the agent of the shareholder who appoints him. As between himself and the proxy he can determine the agency, and the agent is not entitled to vote if the agency is in fact determined. The shareholder, as between himself and the company, has the option of voting in person or by proxy. If he votes in person quite obviously he cannot also vote by proxy. As between himself and the company if he allows the proxy to vote, and the company accepts that vote, he cannot afterwards claim to vote personally. But this is not what happened in the present case. The shareholders in question and their proxies tendered votes in respect of the same shares, and it was not until the votes came to be considered that the company had to determine which of the votes had to be accepted. A company finding votes cast in respect of the same shares is bound to consider which votes are to be accepted, and where the votes of a shareholder are cast by that shareholder himself in a manner justified by the articles, I think the company is, in the absence of any particular circumstances, bound to accept those votes, notwithstanding that a person who has been validly appointed as proxy in respect of the same shares has also purported to vote. The right of the shareholder to vote in person must, in my judgment, and in the absence of any special contract between himself and the company expressly precluding the right to vote in person where a proxy has been validly given, be paramount to the right of the proxy to vote in respect of the shares in question.

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(1) [1926] W. N. 78.

There is, in my judgment, no contract binding the shareholder vis-à-vis the company to exercise the option to vote either in person or by proxy at any time before the actual moment when the vote is to be given. The giving of the proxy may obviously, as between the shareholder and his proxy, be conditional on the shareholder being prevented from attending the meeting and voting at it in person. Therefore if the plaintiff's contention is correct, a shareholder who has given a proxy which has not been revoked in accordance with the provisions of article 76, loses his right to vote in person even though the proxy does not tender any vote in respect of the shares covered by the proxy. This would certainly be a singular result.

Further, as I read article 76, its object is not to preclude a shareholder who has given a valid proxy from voting in person, but to protect the company in case the proxy is effectively used, from any liability to inquire whether it has in fact been revoked or not. It does not purport to deal, and cannot in my judgment be construed as dealing with the case where a shareholder who has given a proxy elects, notwithstanding such proxy, to exercise his right to vote in person.

It follows from what I have said, that in my judgment the 11,396 votes which were cast by shareholders who had given the plaintiff Cousins proxies in respect of those shares were properly accepted by the company, and that the votes tendered by the plaintiff Cousins in respect of the same shares under those proxies were validly rejected.

In the result, the amendment for the appointment of the plaintiff H. G. T. Carr as a director was in fact defeated on the poll. The resolution to re-elect the defendant Pantlin as a director was put to the adjourned meeting, and was carried on a show of hands, and no poll was demanded. I therefore think he was validly re-elected.

I must accordingly refuse the relief sought in the motion. If the parties are willing to treat the hearing of the motion as the trial, I am prepared to allow this course to be adopted, and in that case I would make a final order dismissing the action with costs. If they are not prepared to do this, then I will make no order on the motion, except that the costs of the motion are to be costs in the action. P. J. B.

The plaintiffs appealed. The appeal was heard on January 12, 1931.

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R. J. Sutcliffe for the appellants. Shareholders who have given proxies which have not been validly revoked cannot vote personally and in a contrary sense. Certainly there is no decision to the effect that they can. The right to vote by proxy is a contractual right conferred by the articles of the company. By the Companies Act, 1929, s. 20, the memorandum and articles of association of a company bind the company and its members as much as if they had been signed and sealed by each member and he had agreed to comply with them: compare *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association.* (1) The contract is binding, both as between the shareholder and the company and the shareholders inter se. Here article 74 confers a right to vote in person or by proxy, and articles 75 and 76 deal with voting by proxy. These articles constitute the contract in regard to voting, and article 76 makes it a term that a proxy cannot be revoked except by notice in writing duly given before the meeting. Here the purported revocation was between the dates of the meeting and an adjournment thereof. That is too late: *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (1908), *Ld.* (2)

[Lawrence L.J. In that case it was a question of voting, not at an adjourned meeting but at a poll directed to be taken at a date subsequent to the meeting.]

In *McLaren* v. *Thomson* (3) the Court of Appeal decided that where the articles of a company required lodgment of the instrument appointing a proxy two clear days before the meeting, it could not be made effective at an adjourned meeting by lodging it between the dates of the meeting and the adjournment thereof, because the adjourned meeting was merely a continuation of the original meeting. The same principle applies here.

[Lord Hanworth M.R. It still has to be shown that the right of the shareholder to vote in person is taken away when he has given a proxy and not revoked it.]

(1) [1915] 1 Ch. 881.
(2) [1926] W. N. 78.
(3) [1917] 2 Ch. 41.

On the construction of the articles, as soon as a shareholder has exercised his option to vote either personally or by proxy by deciding irrevocably in favour of voting at a meeting by proxy, the right to vote in person is gone. To construe the articles otherwise would be to treat article 76 as existing only for the benefit of the company. The proper effect is not given to article 76 if an unrevoked proxy is to be useless whenever the shareholder attends and votes himself.

H. S. G. Buckmaster for the respondents was not called upon.

Lord Hanworth M.R. In this case we have to determine a point as to voting in a company. It is a point arising under the articles of association of the company. Luxmoore J. has stated the facts fully and sufficiently and I do not desire to make any alteration or add to his statement. The question we have to determine is whether at the adjourned meeting of the company on November 3, 1930, the chairman was right in counting 11,396 votes as cast against an amendment then put or whether they should be counted on the other side in view of the proxies that had been given.

The controversy was whether a retiring director should be re-elected or a new director put in his place. The general meeting was held on October 20, 1930. At that time it was proposed that Mr. Pantlin should be re-elected and the plaintiff Cousins proposed by way of amendment that the plaintiff Carr should be elected in his place. The objection was then taken by the chairman to the proposed candidate on the ground that he had not properly consented to act as a director. When the result of a vote by show of hands was declared and it was said that Mr. Pantlin had been re-elected, a poll was demanded, and the meeting was then adjourned till November 3. In the intervening time an arrangement was made that the amendment should be put at the adjourned meeting. Mr. Hopkins was then in the chair and the amendment was put proposing that Mr. Carr should be elected in place of Mr. Pantlin. The voting having taken place it was declared by the chairman that the amendment was lost and thereupon the resolution proposing the re-election of Mr. Pantlin was put and carried by a show of hands.

What is said is that 11,396 votes ought not to have been counted against the amendment, although those votes were tendered by the shareholders in person, because it is said that they had lost the right to vote in person after having given proxies which under the articles relating to proxies held good at the adjourned meeting. Mr. Sutcliffe has argued the case with force and clearness, and a great many of his propositions need not be disputed, while others need not be decided. He has referred to cases which, he says, decide that the meeting which reached a conclusion on November 3 was the meeting that began on October 20. It would seem that the system in regard to proxies laid down by the articles indicates that if a proxy is once given, then for the purpose of putting an end to it, notice must be given and received by the company before the meeting, and I will take it as established that for the present purposes the meeting so referred to is the meeting which commenced on October 20. Some considerations have been indicated during the argument by Lawrence L.J. that might make it desirable to hold that there had been such a distinction between the meeting on October 20 and the adjourned meeting on November 3 as to divide them into two separate meetings; but it is unnecessary to determine this and I am prepared to accept the view that the whole proceedings were all part of the meeting which commenced on October 20.

Attention has been called to Russell J.'s decision in *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (1908), *Ld.* (1) In that case he held that when there is a continuation of a meeting at a subsequent date for the purpose of taking a poll, it is all one meeting and the date of the commencement of the meeting is the date before which a notice must be given revoking a proxy so as to comply with an article similar to article 76 in the present case. I am accepting that and I am prepared to deal with the case on the view that, as matters stand, the proxies given to Mr. Cousins were valid and had not been withdrawn on November 3 or brought to an end by the happening of any of the contingencies mentioned in article 76.

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(1) [1926] W. N. 78.

But the point we have to determine is whether a shareholder who has given a proxy is bound by it, when it has been given some days before and not been determined in accordance with the articles, so as to prevent his giving a valid vote at the meeting when he attends personally. Has he or has he not instituted a system under which his vote must be given by proxy?

The answer must depend on the construction of the articles. The combined effect of the articles and s. 20 of the Companies Act, 1929, is to make the provisions as to voting contained in the articles a matter of contract between the shareholders and the company, and, it may be, between the shareholders inter se, though it is not necessary finally to determine that. At any rate as between the shareholders and the company articles 74, 75 and 76 have in this case introduced by way of contract certain arrangements as to voting. But that fact does not exclude the ground on which Luxmoore J. decided this case.

It is laid down in article 74 that "votes may be given personally or by proxy." That being so, it became necessary for the articles to lay down how votes by proxy were to be given, as there is not a common law right to vote by proxy. It is a matter of stipulation between the company and the shareholders. Article 74, however, clearly indicates two alternative modes of voting—in person or by proxy. Then the subsequent two articles indicate the path to be followed if a shareholder decides to place his right of voting in the hand of a proxy. What then is meant by a proxy? A person representative of the shareholder who may be described as his agent to carry out a course which the shareholder himself has decided upon.

In the present case due steps were taken to give valid proxies to be effective at the meeting of October 20 and any adjournment thereof and there was no effective attempt to revoke them in accordance with article 76. Therefore at the

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date of the adjourned meeting there were in the hands of the proxy the 11,396 votes in question, which in the ordinary case would have been valid and counted when tendered. But the persons who had given those proxies were present, and instead of allowing their proxy to hand in the votes, they determined to exercise their alternative right and vote personally, and the votes cast by them personally were in a contrary sense to what they would have been if the proxies had been accepted.

It is said that by giving proxies they were prevented from attending personally and voting, that having set in motion the proxy provisions they had disabled themselves from voting personally. The articles might be so drawn as to produce that result, but when I examine these three articles I find no such exclusion of the personal right of the shareholder to vote. Article 74 states that there are the alternative rights of voting in person or by proxy. The subsequent articles define the channel along which the proxy system is to flow, but do not negative the use of the alternative right of voting personally. It follows that the personal right to vote is not taken away and, indeed, it would be strange if a person in the position of an agent could say to his principal: "You have entrusted to me a power which I will not allow to pass back to you, although you demand the right to exercise it."

In the absence of clear words taking away the shareholder's personal right to vote after he has put in force the proxy system, that personal right remains and the shareholder is able to attend and give his own vote according to his own volition and the proxy has no right to prevent it.

For these reasons, in addition to those given in the clear judgment of Luxmoore J., with which I agree, the appeal must be dismissed.

LAWRENCE L.J. I agree, and I have very little to add to the judgments of Luxmoore J. and the Master of the Rolls with which I entirely concur.

The question is whether a shareholder by having appointed a proxy to vote for him at a particular meeting has precluded

Lawrence L.J.

himself from voting personally at that meeting and whether, if he does vote personally, the chairman of the meeting is justified in rejecting his vote and accepting that of his proxy. Article 74 gives the shareholders in the defendant company the alternative right to vote, either in person or by proxy. Is there anything in that article to preclude a shareholder from exercising his right to vote personally because before the meeting he has appointed a proxy ? It is not suggested that the shareholder is not entitled to attend the meeting, but it is said that he cannot vote personally at it after he has given a proxy unless that proxy has been duly revoked before the meeting in accordance with article 76, which is as follows : [His Lordship read the article.] In my judgment that article does not prevent the shareholder from exercising his right to vote in person. Every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the shareholder, and as between himself and his principal is not entitled to act contrary to the instructions of the latter. As between these persons and the company, the shareholder is under article 74 entitled to exercise his option to vote in person or by proxy at the time when the occasion for its exercise arises, that is to say, when the vote is taken and if the proxy insists on voting notwithstanding that the shareholder himself attends and votes and thus a double vote is given at the meeting in respect of the same shares, it is the duty of the chairman to reject the vote of the proxy as the personal vote is an unequivocal exercise on the part of the shareholder of his option to vote in person.

Article 76 is merely directed to safeguarding the company and the chairman of a meeting when acting on votes given by proxy. It is reasonable if a shareholder does not attend and vote himself that if he wishes to revoke a proxy he should do so by a proper notice given to the company before the meeting. It is also reasonable that the validity of a vote given by proxy should not depend on whether the shareholder giving the proxy has died before the meeting (a fact which might be difficult to ascertain) unless a proper notice of the death be given; and the same considerations apply to a transfer of shares made by a shareholder after having given a proxy. The learned judge was, I think, clearly right in holding that none of these considerations apply when a shareholder, after having given a proxy, comes to a meeting himself and exercises his right to vote in person. In such a case the proxy cannot be used and there is no necessity to inquire whether it was validly given in the first instance or whether it has since been revoked. In my opinion therefore article 76 has no application to the case where a shareholder attends the meeting and votes in person.

For these reasons and for those given by the Master of the Rolls I agree that the appeal should be dismissed.

Romer L.J. I am of the same opinion. The decision of Luxmoore J. seems to me to be summed up in these four lines of his judgment: "There is, in my judgment, no contract binding the shareholders vis-à-vis the company to exercise the option to vote either in person or by proxy at any time before the actual moment when the vote is to be given." With that sentence I find myself in complete accord.

By article 74 votes may be given by shareholders in person or by proxy, and in article 76, upon which reliance has been placed by Mr. Sutcliffe, we find certain provisions relating to the event of a shareholder having elected that his vote shall be given not in person but by proxy. That article throws no light, in my opinion, on the question up to what time the shareholder can exercise the option given to him by article 74 of voting personally or by proxy. It was no doubt contemplated by article 76 that the proxy was to be revoked by notice in writing, but when a shareholder appears at the meeting and says he prefers to vote in person, he is not revoking the proxy previously given, but doing an act which does away with the necessity of the proxy ever being exercised at all. A proxy is always subject to an understanding that the shareholder giving it does not elect to give his vote in person and when he in fact gives a vote in person he is not revoking the proxy but taking a step which obviates the necessity of the proxy being used at all.

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For these reasons I agree that the appeal must be dismissed.

We have not been asked to consider whether the 36,991 votes, in respect of which proxies were given, but purported to be withdrawn before November 3, and in respect of which shareholders had not voted in person, were properly disallowed. Speaking for myself, I think they ought not to have been disallowed. But it by no means follows that, as between the proxy and the shareholder, the proxy in voting in accordance with the power given to him after notice that the power was withdrawn was not committing a breach of duty to his principal in voting. The question is not raised in this case, but I desire to mention the point to show that it has not been overlooked.

Appeal dismissed.

Solicitors: *Bateman & Co.; Clifford-Turner Hopton & Lawrence.*

H. C. G.

LORD TOMLIN.*
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March 4.

WILKES *v.* ALLINGTON.

[1929. W. 4378.]

Donatio mortis causa—Donor suffering from incurable Disease—Delivery of Mortgage Deed to Representatives of Mortgagor—Intention—Validity—Release of Mortgage—Death of Donor from another Cause.

By a mortgage made in 1922 the widow of J. A., who was tenant for life under his will, mortgaged a farm to W. D. A., a brother of J. A., to secure 1000*l.* and interest at 5 per cent. The widow died in 1923, having appointed her two daughters, E. A. and A. A., executors of her will. The mortgage contained no personal covenant for payment of the principal, and the mortgagee accepted interest at 3½ per cent., reduced in 1924 to 3 per cent. In 1924 W. D. A., who was on very friendly terms with his brother's family, gave the deeds relating to the farm, other than the mortgage deed, to E. A. and A. A. to retain in their custody. On December 11, 1927, W. D. A., who had since 1922 been suffering from an incurable disease and knew that he could not possibly live long, called upon his nieces, who were aware of his state of health, and gave them an envelope indorsed in his own handwriting: "Deeds relating to X. farm to be given up at death. W. A.," saying: "I have brought this down for you; put it away." After he had left the house the envelope was opened, and was found to contain the mortgage, which the nieces placed in their safe. On January 23, 1928, W. D. A. died of pneumonia following a chill. In an action by his executors for a declaration that the mortgage was a subsisting security and to enforce it:—

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* Sitting as additional Judge of the Chancery Division.

Held, that there was a valid donatio mortis causa by W. D. A., and a release of the mortgage to the two daughters of J. A. for the benefit of his estate.

A donatio mortis causa is not generally conditioned upon the donor dying from the same disorder as that from which he is suffering, and contemplates the probability of death, at the time it is made.

WITNESS ACTION.

The following statement of facts is substantially taken from the judgment of Lord Tomlin.

The action is brought by the executors of William Diaper Allington, who died on January 23, 1928, claiming a declaration that a mortgage dated April 2, 1923, and made between Ada Allington of the one part and the testator of the other part, of Astwood Farm, near Worcester, to secure 1000*l.* and interest is still subsisting and in force and that the moneys owing thereunder form part of the testator's estate and for an order for delivery up of the mortgage to the plaintiff, and to have it enforced by foreclosure or sale. The question is whether in the circumstances, which I shall shortly indicate, the testator did or did not make an effectual donatio mortis causa in favour of the children of his deceased brother John Allington or some of them.

The testator, a farmer in apparently good circumstances, was carrying on a farm, known as Spellis Farm, a few miles from Worcester, and had a brother John Allington, who carried on Astwood Farm, distant about three miles from his own farm. John Allington died in 1922, and his farm, which is partly freehold and partly long leasehold, passed under his will to his widow Ada Allington for her life and then to his children in equal shares. The widow in 1923 mortgaged Astwood Farm to the testator to secure an advance of 1000*l.* and interest thereon at 5 per cent. The mortgage is somewhat unusual in form. The document in its operative part contains a conveyance by the mortgagor, as executrix of John Allington, to the mortgagee to secure the money with a proviso for redemption, but there is no covenant for repayment in the mortgage, and there is a proviso that the executrix shall not be personally liable for payment of the 1000*l.* and interest or for any expense incurred in repairing and insuring the buildings.

Shortly after the execution of the mortgage on August 3, 1923, Mrs. Allington died, having by her will appointed the defendants Elizabeth and Ada Allington executrixes thereof, and they then paid interest on the mortgage to the testator at the rate of 3½ per cent. The farm has been carried on by the defendants Elizabeth and Ada Allington, with whom their brother Charles Allington, who is an invalid, lives. The testator was on terms of close intimacy with his nephews and nieces, and went to see them about once a week. Interest was paid at 3½ per cent. until some time in 1926, when the testator told Elizabeth to make out a cheque for interest at the rate of 3 per cent. only. There was no interest in arrear at the date of the testator's death.

It appears that in 1922 the testator finding that he was ill consulted a specialist at Birmingham, who advised him that he was suffering from cancer, and that an operation would be necessary. But the testator apparently refused to undergo an operation, and from that time forward he regarded himself as a man under sentence of death, and although he continued to carry on his farm, he remained seriously ill and had often to take to his bed. In February, 1924, he visited Astwood, and he asked his two nieces where they kept their papers. They replied that they had a safe, and he then said, " I might bring down those deeds, you might as well keep them as I," and on Easter Monday, 1924, he handed over to them a packet of deeds relating to Astwood, which they put away in the safe, and which was not opened until after his death. This packet of deeds did not include the mortgage. In August, 1925, he was lying ill in bed, and the defendants Elizabeth and Ada Allington went to Spellis to see him. He then said he thought he was dying, but that there was no need for them to worry, and added : " I have remembered you in my will and have instructed Fred Priday to give you back that mortgage when I am gone; tear it up." Fred Priday was one of the executors of the testator.

On Sunday afternoon, December 11, 1927, the testator came over to Astwood, where only his two nieces Elizabeth and Ada were at home. When he came in, as he passed the couch, he laid a small envelope upon it, and said: "I have brought this down for you; put it away." The two nieces were then engaged in getting tea ready, and nothing more was said about the matter until the testator had left the house after tea, when the envelope was opened, and was found to contain the mortgage. The envelope was addressed to the testator at his own farm in his solicitor's writing. On the front were the words, "Mortgage relating to Astwood," and on the back the words, in the testator's own writing, "Deeds relating to Astwood. To be given up at death. W. Allington."

Between that time and Christmas, 1927, the testator was apparently, for him, in his normal health, and on January 11, 1928, he attended Worcester market, but coming home in a motor 'bus he took a chill, from which he developed double pneumonia. He died of pneumonia on January 23, 1928.

The only other matter to which reference need be made is the evidence of the testator's housekeeper, Edith Smith. She confirmed the other evidence as to the testator's health, and said that on the Sunday, December 11, 1927, on which he went to Astwood, he showed her the mortgage, and said he was going to take it down to the girls and give it to them. He added that he expected his brother Sydney (to whom he had also lent money) and the Misses Allington to pay him interest on their mortgages during his lifetime, for "he was not going to undress until he went to bed," "by which metaphorical expression," his Lordship added, "I understand him to mean that he did not intend to divest himself of any of his property so long as he lived."

Sir Gerald Hurst K.C. and *Laurence Tillard* for the plaintiffs. The mortgage being admitted, the onus is on the defendants, who set up a donatio mortis causa.

Charles Jenkins K.C. and *H. F. F. Greenland* for the defendants. It is submitted that on the evidence all the conditions for a valid donatio mortis causa are satisfied: (1.) good delivery; (2.) intention to benefit the donees; (3.) contemplation, though not necessarily immediate expectation of death; (4.) gift not to take effect unless and until the donor died: *Cain* v. *Moon.* (1) The mortgage was not handed over merely for safe custody, as the testator had a safe of his own. The delivery of the mortgage deed was a good release of the mortgage debt: *Duffield* v. *Elwes.* (2) If this did not amount to a valid donatio mortis causa, it was alternatively a substantial and effective gift inter vivos. *Gardner* v. *Parker*(3) was a very similar case to the present. The testator knew that he could not possibly live long, and the gift was made to take effect only if and when he died. The fact that he died from pneumonia when he was suffering from cancer makes no difference; a gift made in contemplation of death is not conditional on death taking place only in a particular manner: *In re Richards.* (4) The statement in Williams on Executors to the contrary is not supported by any authority. In *In re Weston* (5) there was an interval of two months between the gift and the death, and it was not suggested that such an interval made any difference.

Sir Gerald Hurst K.C. and *Laurence Tillard* for the plaintiffs. The evidence, we submit, has failed to establish a donatio mortis causa. The indorsement on the envelope shows that it was to be given up on death, but there is nothing to indicate an intention to revest the property in the testator if he recovered. The words, "I have brought this down for you; put it away," are not words creating a gift. The defendants were mere custodians of the mortgage.

[LORD TOMLIN. He told his housekeeper he was going to his nieces to give the mortgage to them. He had a safe in his own house, and was quite capable of looking after any documents.]

(1) [1896] 2 Q. B. 283, 286.
(2) (1827) 1 Bli. N. S. 497.
(3) (1818) 3 Madd. 184.
(4) [1921] 1 Ch. 513.
(5) [1902] 1 Ch. 680.

It does not necessarily follow that there was a valid donatio mortis causa, because there may have been an intention to benefit the defendants. The third requisite of a donatio is that the thing given must revert to the donor if he should recover: *Edwards* v. *Jones.* (1) On December 11, 1927, the testator was no worse in health than he had been for a long time.

[LORD TOMLIN. Do you say that the gift must be one to take effect only in the event of death from the donor's existing disorder ?]

There appears to be no authority on this point, though a statement to that effect is in Williams on Executors, 12th ed., p. 479.

LORD TOMLIN [after stating the facts as above set out :] The essential conditions for a valid donatio mortis causa are stated by Lord Russell of Killowen C.J. in *Cain* v. *Moon* (2), where he said : " For an effectual donatio mortis causa three things must combine : first, the gift or donation must have been in contemplation, though not necessarily in expectation of death ; secondly, there must have been delivery to the donee of the subject-matter of the gift : and thirdly, the gift must be made under such circumstances as to show that the thing is to revert to the donor in case he should recover."

It is admitted that the testator in his own house had a safe, and the first thing that strikes me is this. It is inconceivable why he should have taken down any of these documents to Astwood, and given them to the ladies, except upon the footing that he was intending to confer some benefit upon them, and I think the fair inference to draw is that he was intending to confer some benefit upon them. Of course, that does not conclude the matter, because the benefit he intended to confer may not have been such a benefit as is of the essence of a donatio mortis causa. I will deal with that later. At any rate, this is plain from what happened in December, 1927. There was a delivery—no one disputes that—and it was a delivery of a document, which, if it was

(1) (1835) 7 Sim. 325.

(2) [1896] 2 Q. B. 283, 286.

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given in the proper circumstances and with the proper intention, would have been operative as a donatio mortis causa, as was held in the case of *Duffield* v. *Elwes* (1) by Lord Eldon. Secondly, there is no doubt about this, that there was contemplation of death; and, as Lord Russell has said, it is not necessarily expectation of death, by which I imagine he means expectation of immediate death. That this man believed himself to be in the shadow of death I do not doubt; I think it is clear upon the evidence that he believed himself to be a doomed man. He did not know how long he had to live, but he was satisfied, I think, that he had not long to live, and I think that within the meaning of the phrase which Lord Russell has used, what he did he did in contemplation of death. It is said, in a passage in Williams (12th ed., at p. 479), that the gift must be conditioned to take effect only upon the death of the donor by his existing disorder. No authority has been cited to me for that particular proposition. In fact, the testator did not die by the actual disorder from which he was suffering at the time when he handed over the deed, because he died from pneumonia, which supervened upon a chill. If a man, in contemplation of death within the meaning of the phrase, as used by Lord Russell, in fact dies from some cause other than the disorder which was present to his mind when he made the gift, I have a difficulty in seeing why the gift is not operative. So far as it has any bearing upon the matter I think the case of *In re Richards* (2), before Eve J., supports the view that contemplation of death is a necessary element, and that if the donor does in fact die the gift takes effect. But then it is said that there is no indication here that it was intended that if he recovered the gift should be returned. This is the real point, it seems to me, in the case. It is said that assuming that he intended to benefit the defendants, the whole matter is consistent with his intention that they should have the gift of the mortgage on his death, but reserving to himself the interest during his life; in other words, that it was an absolute gift to them in futuro, and not a gift to them which

(1) 1 Bli. N. S. 497.

(2) [1921] 1 Ch. 513.

was to be returned in the event of his recovery. Of course, the line is rather fine, because when a man is smitten with a mortal disease, he may know, in fact, that there cannot be any recovery; yet I apprehend that a man in that situation, in point of law, is capable of creating a good donatio mortis causa. The question is: what is the fair inference to be drawn from all the circumstances? It is said that the indorsement on the envelope, to which I have referred, is against the contention that there is a donatio mortis causa. For my part, I do not take that view. I think it is plain that the indorsement on the envelope was an indorsement made at a time when his intention was not to give the defendants anything during his lifetime; but to have the instructions which he had given to Mr. Priday carried out—namely, that after his death the mortgage should be handed over and released to the defendants. I think that the indorsement had no reference at all to the circumstances in which he handed over the envelope to the ladies. From all the circumstances that I have mentioned, and, in particular, having regard to the conversation with the housekeeper, I think the fair inference is this: that he changed his mind; that, although originally he had intended that there should be no handing over or gift to them till after his death, yet he changed his mind as he felt his disease creeping upon him, and that he did intend to make it over to them in the event of his death, and that there can be implied an intention that it should be returned to him if he recovered, just as it was implied in the presence of very similar words in the case of *Gardner* v. *Parker*. (1) It is a fair inference to draw from all the circumstances of the case that, if he had recovered, the subject-matter of the gift would have been returned to him. Upon that view of the case I think the defendants make out this position: that to the two ladies, in whom, as legal personal representatives, the Astwood estate was vested, the testator intended to release the mortgage of the Astwood estate, for the benefit of those interested in the Astwood estate, in the event of his dying;

(1) 3 Madd. 184.

but to be returned in the event of his recovery. I think the result is that I must dismiss the action, with costs.

Solicitors: *Peacock & Goddard, for W. A. Parry, Worcester; Church, Rendell, Bird & Co.*

H. L. L.

LORD TOMLIN
1931
March 5, 6.

HOMES v. NEWMAN.

[1929. H. 4148.]

Evidence—Admissibility—Res gestae—Written Entries by Deceased Person against Proprietary Interest—Action to Establish Charge on Land by Deposit of Title Deeds.

The plaintiffs, the personal representatives of Mary Ann Inett, who died in 1928, claimed a declaration that they were entitled to a charge for 300*l.* with interest on a farm known as "Watkins" and foreclosure or sale.

They alleged: (1.) That one Mutlow was at his death seised of lands which included "Watkins" subject to an equitable charge by deposit of the title deeds with one Parker to secure 900*l.* with interest; (2.) that Mutlow devised "Watkins" to Anne Inett for life, with remainder to her daughter Mary Ann Inett for life, and devised the residue of his estate to Ann Morgan; (3.) that on the death of Mutlow in 1876, on counsel's advice, his executors allocated 300*l.*, as the rateable proportion of the 900*l.*, to "Watkins"; (4.) that 300*l.* was borrowed by those executors from William Homes, the executor and trustee of the will of Thomas Inett, who advanced that sum out of trust moneys, part of his testator's estate, and that, Parker having been paid that sum, the title deeds of "Watkins" were deposited with Homes to secure the 300*l.* so advanced by him with interest; (5.) that under Thomas Inett's will, on the death of Anne Inett his wife, in 1900, his estate became divisible between Mary Ann Inett and her sister, Elizabeth Mutlow Homes, in equal shares, and that in course of administration the 300*l.* charge was appropriated as part of the share of Mary Ann Inett and the title deeds of "Watkins" were handed over to her by William Homes.

It was not disputed that in 1855 Mutlow borrowed 1500*l.* from Parker on a bond. But the defendant did not admit that "Watkins," to which she claimed to be entitled through Ann Morgan, was subject to a charge in favour of Parker, nor did the defendant admit the truth of any of the plaintiffs' allegations aforesaid. In proof of their claim the plaintiffs sought to adduce in evidence, amongst other documents, a memorandum proved to have been signed in 1902 by Mary Ann Inett, her sister and William Homes, and headed in the matter of the "Watkins" estate, in which it was stated that "Watkins" was bought by Mutlow in

1851, and that in 1855 he deposited the deeds of "Watkins" and other properties with Parker to secure 1500*l.*, and that a balance of 900*l.* with interest was owing on Mutlow's death. It stated Mutlow's will and death, and, almost verbatim, the several other facts alleged by the plaintiffs as hereinbefore stated.

At the time of this action the defendant was in possession of "Watkins," and denied that "Watkins" was subject to the 300*l.* charge claimed by the plaintiffs. No direct evidence was forthcoming to prove the facts on which the plaintiffs relied, and it was mainly on the ground that the acknowledgment in the memorandum by Mary Ann Inett, deceased, that the 300*l.* charge on "Watkins" was appropriated in part satisfaction of her share in Thomas Inett's estate constituted a declaration against her proprietary interest that the plaintiffs sought to establish their claim.

Upon the preliminary question as to the admissibility in evidence of the memorandum:—

Held, that the memorandum having been signed contemporaneously with and to record the delivery of the deeds to Mary Ann Inett, was admissible to prove not only the fact of their delivery to her but also the circumstances which led up to and explained the principal fact in issue—namely, how the deeds came into her possession; and further, that the statement by Mary Ann Inett in the memorandum of her acknowledgment of the appropriation to her of the charge in question was, in the circumstances, a declaration against her proprietary interest, and that that statement and the other statements in the memorandum were so inter-connected and explanatory as to render them all admissible in evidence.

In this action the plaintiffs, the executors of the will of Mary Ann Inett who died on May 25, 1928, claimed (1.) a declaration that the estate known as "Watkins" in the parish of Bishops Frome in the county of Hereford was subject to a charge for 300*l.* with interest from the death of Mary Ann Inett, (2.) an account of what was due under the charge, (3.) payment of what should be found due, (4.) foreclosure or sale.

The plaintiffs by their statement of claim alleged as follows: James Thomas Mutlow was at his death seised of "Watkins" subject, together with other properties of his, to an equitable charge by deposit of the title deeds in favour of John Parker to secure 900*l.* and interest at 5*l.* per cent. per annum. By his will dated July 19, 1876, J. T. Mutlow devised "Watkins" to Anne Inett for her life and after her decease to her daughter Mary Ann Inett for her life and after her decease to the eldest son of Mary Ann Inett absolutely and devised and bequeathed the residue of his estate to Ann Morgan.

At the death of the testator in the same year his executors were advised by counsel that the several properties of the testator subject to that charge of 900*l.* ought to be made to bear the same rateably, according to their respective values: and, accordingly, the sum of 300*l.* was allocated to "Watkins," and that sum was borrowed by them and applied in the redemption of "Watkins" and recovering the title deeds relating thereto.

The sum of 300*l.* so borrowed was advanced by William Homes as executor and trustee of the will of Thomas Inett who died on February 25, 1859, out of trust moneys forming part of his estate and upon that advance the title deeds of "Watkins" were deposited anew with William Homes to secure the 300*l.* and interest.

Thomas Inett by his will gave certain interests in his estate to his wife, the said Anne Inett for her life, and, subject thereto, he gave the whole of his estate to his two daughters Mary Ann Inett and Elizabeth Mutlow Homes in equal shares.

Upon the death of Anne Inett on July 12, 1900, the charge of 300*l.* secured upon "Watkins" was in the course of the administration of Thomas Inett's estate by William Homes, the surviving executor and trustee of his will, appropriated to Mary Ann Inett in partial satisfaction of her share in the estate of Thomas Inett, and the title deeds of "Watkins" were in pursuance of such appropriation handed over to her by William Homes. At the time of such appropriation Mary Ann Inett succeeded as tenant for life under the will of J. T. Mutlow to the whole of the rents and profits of "Watkins." In those circumstances the interest which would have been receivable by her in her capacity of legatee under the will of Thomas Inett would have been also payable by her in her capacity of tenant for life under J. T. Mutlow's will, with the result that no interest was ever formally paid during the life of Mary Ann Inett.

Mary Ann Inett died a spinster on May 25, 1928, having by her will appointed the plaintiffs to be the executors thereof.

The defendant, who claimed through Ann Morgan, was in possession of "Watkins" and refused to acknowledge the charge of 300*l.* or to make any payment in respect thereof.

It was not disputed by the defendant that the charge had its origin on December 26, 1855, when J. T. Mutlow borrowed 1500*l.* from John Parker on a bond; nor was it disputed that the balance of that debt amounting at the death of J. T. Mutlow to 900*l.* was on October 31, 1876, repaid by Mutlow's executors to John Parker.

But the defendant did not admit that "Watkins" was subject to an equitable charge by deposit of the title deeds in favour of John Parker to secure that sum; nor did she admit the truth of any of the plaintiffs' allegations above set forth. She did admit by her defence that on the death of Anne Inett, Mary Ann Inett entered into possession and the receipt of the rents and profits of "Watkins" and of the other properties devised to her by the will of J. T. Mutlow and that the title deeds relating to those properties, including "Watkins," were handed over to her by William Homes; but subsequently, in spite of that admission, by notice to admit facts she required the plaintiffs to admit that Mary Ann Inett when she succeeded as tenant for life to "Watkins" under J. T. Mutlow's will obtained possession of the title deeds in that capacity, an admission which the plaintiffs refused to make.

In proof of the allegations that at the time of the death of J. T. Mutlow the sum of 900*l.* was secured by a deposit of the title deeds of "Watkins" and the other properties devised by the will of J. T. Mutlow and that in the course of providing the moneys required to pay off that balance then owing to John Parker the sum of 300*l.* which had been allocated to "Watkins" was advanced to the executors of J. T. Mutlow by William Homes, the executor of Thomas Inett's will, out of trust moneys forming part of his estate with whom the title deeds of "Watkins" were then deposited by way of equitable security for that sum, and in proof of the allegation that that charge for 300*l.* upon "Watkins" was appropriated by William Homes to Mary Ann Inett in partial satisfaction of her share in Thomas Inett's estate the following documents were tendered in evidence by the plaintiffs: the signed statements by Mary Ann Inett contained in the memorandum of March, 1902, a letter written in the ordinary course of business by Mr. Charles E. Lilley, the solicitor then acting for William Homes, to Mary Ann Inett in which reference is made to an arrangement come to with her sister Mrs. Elizabeth Homes whereby the whole of the 300*l.*, part of the estate of her father Thomas Inett, was to belong to Mary Ann Inett and advising that the proper course would be for William Homes to hand over to her the title deeds relating to "Watkins" together with the memorandum setting forth that the property was subject to an equitable charge for 300*l.* which belonged to her as part of her father's estate; a letter dated September 9, 1876, written by John Parker informing H. G. Goldingham, who was then one of the executors of James Thomas Mutlow's will, that the amount due to him, John Parker, was 900*l.*, the remainder of a loan of 1500*l.* lent many years since to James Thomas Mutlow and stating that the writer held a conveyance of some property at Paunton as a collateral security; accounts of succession duty and estate duty payable on the death of Anne Inett in respect of "Watkins" in each of which references were made to a charge for 300*l.* by deposit of the title deeds relating to "Watkins" expressed to be then due to William Homes, the personal representative of James Mutlow, who had been the surviving executor of the will of Thomas Inett deceased.

The preliminary question as to the admissibility in evidence of the memorandum was first argued.

Manning K.C. and *A. C. Nesbitt* for the plaintiffs. The memorandum is admissible in evidence on two grounds: first there is a statement in it by Mary Ann Inett deceased which amounts to an acknowledgment by her that she had had transferred to her in part satisfaction of her share in

Thomas Inett's estate the 300*l.* charge on "Watkins" by the title deeds having been deposited with her. The memorandum is admissible as forming part of the res gestae. The other statements in it are closely connected with and explanatory of the matter in issue: as Parke B. said in *Wright* v. *Tatham* (1): "The acts, by whomsoever done, are res gestae, if relevant to the matter in issue": see Taylor on Evidence, 11th ed., para. 572, p. 395. The title deeds of "Watkins" were in the possession of Mary Ann Inett at her decease and are now in the possession of the plaintiffs as her personal representatives; and the acknowledgment by her contained in the contemporaneous memorandum which accompanied the act of handing over the deeds to her ought to be admitted in evidence to explain in what character they came into her hands: Taylor on Evidence, 11th ed., para. 583, p. 401.

Secondly, the statement by Mary Ann Inett as to the appropriation of the 300*l.* charge towards her share in Thomas Inett's estate is a declaration against her interest; it would have been more to her advantage to take 300*l.* than to have a mere charge for that amount; and further, as she was tenant for life of "Watkins" under Mutlow's will, it was against her interest to accept a charge upon that particular property: Taylor on Evidence, 11th ed., para. 676, p. 463; *Taylor* v. *Witham.* (2) Although that declaration was by a predecessor in title, it is admissible in evidence for all purposes and against all persons for the purpose of explaining the character of her interest in "Watkins" and it bound the defendant: *Taylor* v. *Witham* (2); Taylor on Evidence, 11th ed., para. 684, p. 468. In *In re Fountaine* (3) Kennedy L.J. said: "Where you have entries made by a person which can fairly be construed as prima facie against his interest, that evidence is admissible as evidence for all purposes irrespective of its effect or value when received."

Sir Herbert Cunliffe K.C. and *H. J. H. Mackay* for the defendant. The memorandum was not a contemporaneous document; it was not signed until about eighteen months after the death of Anne Inett. The statement by Mary Ann Inett, so far from being a declaration against her proprietary interest was a declaration in favour of her interest. The main object of the statement was to perpetuate evidence of the existence of the 300*l.* charge upon "Watkins." She was only tenant for life of "Watkins" and unless she could establish the charge on "Watkins," Ann Morgan would succeed to "Watkins" free of the charge. Further, William Homes was interested in admitting that the charge formed part of the estate of Thomas Inett, because he was accountable as his personal representative for that estate. That Mary Ann Inett acknowledged that she had taken a transfer of the charge in part satisfaction of her share was a mere incident. There is no evidence that the deeds relating to "Watkins" were ever deposited with William Homes. The memorandum is not admissible as evidence that the charge ever formed part of the assets of Thomas Inett. The earlier statements in the memorandum are quite unnecessary if the object was merely to acknowledge the transfer by the executor of Thomas Inett's will of the charge in part satisfaction of Mary Ann Inett's share in the estate. Those earlier statements are not admissible to prove the matter which is really in issue here; they are independent matters unconnected with that matter in issue. The statement by which it is sought to establish the existence of the charge on "Watkins" is in disparagement of Mary Ann Inett's own title as tenant for life under Mutlow's will and is not admissible against the defendant as her successor in title: Taylor on Evidence, 11th ed., para. 687, p. 470.

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(1) (1837) 7 A. & E. 313, 355.

(2) (1876) 3 Ch. D. 605.

(3) [1909] 2 Ch. 382, 396.

LORD TOMLIN. A preliminary question arises for my determination in this action, it is whether the memorandum which was signed in March, 1902, is admissible in evidence in support of the plaintiffs' case. The position from the point of view of the plaintiffs is as follows: under the will of James Thomas Mutlow, who died in 1876, the property called "Watkins" was devised to Anne Inett for her life, and after her decease to Mary Ann Inett for her life with remainder to her eldest son. In the event, which happened, of the death of Mary Ann Inett without issue, one Ann Morgan became absolutely entitled to "Watkins" under the residuary devise contained in the will. The case put forward by the plaintiffs is that at the date of Mutlow's death the title deeds relating to various properties belonging to the testator, including "Watkins," were in the possession of one John Parker to secure 900*l.*, that after the testator's death, upon the advice of counsel, the debt of 900*l.* was allocated rateably between the various properties comprised in the security according to their respective values, the sum of 300*l.* being the amount treated as charged against "Watkins." It was also said that, in order to provide the 300*l.* required to redeem the charge on "Watkins," 300*l.* was advanced by William Homes, the personal representative of Thomas Inett, the deceased husband of Anne Inett, out of assets forming part of Thomas Inett's estate and that accordingly the title deeds of "Watkins" were deposited with William Homes by way of equitable security for that sum. Then it was further said that in the year 1900, upon the death of Anne Inett, who was tenant for life of the estate of Thomas Inett as well as tenant for life of "Watkins," the estate of Thomas Inett, of which the 300*l.* charge formed part, became divisible between Anne Inett's two daughters Mary Ann Inett and Mrs. Elizabeth Mutlow Homes in equal shares, that, in the course of administration William Homes appropriated to Mary Ann Inett the 300*l.* charge on "Watkins" in part satisfaction of her share in her father Thomas Inett's estate and that, in pursuance of that appropriation the title deeds of "Watkins" were handed over to Mary Ann Inett as security for that sum, she being then also tenant for life of "Watkins."

That briefly is the plaintiffs' case; and, in the absence of any direct evidence in support of it, they tender in evidence the memorandum of 1902, which was signed, as has been proved, by William Homes and by Mary Ann Inett and by her sister Mrs. E. M. Homes. The first question I have to decide is whether the memorandum is admissible in evidence

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at all in support of the plaintiffs' case. [His Lordship, after observing that the memorandum was headed in the matter of hereditaments known as "Watkins," read the several statements contained in it, and continued:] There is no question that the title deeds relating to "Watkins" are in the actual possession of the plaintiffs as the personal representatives of Mary Ann Inett. The principal fact in issue which the plaintiffs are seeking to prove is that those deeds came into the hands of Mary Ann Inett, deceased, as part of a transaction whereby William Homes as executor and trustee of Thomas Inett's will in the course of administering that testator's estate transferred to her a particular asset forming part of that estate—namely, the equitable charge for 300*l.* on "Watkins." First, it is said that the facts stated in the memorandum constitute res gestae as explaining the principal fact which I have to determine—namely, how the deeds came into the hands of Mary Ann Inett. The statements in the memorandum, if admissible, prove that, on the death of Anne Inett in 1900, the deeds were handed over to William Homes as security for 300*l.* advanced by him as the personal representative out of the estate of Thomas Inett, deceased, for the purpose of enabling the personal representative of James Thomas Mutlow to redeem Parker's charge on "Watkins" and that the 300*l.* charge was appropriated in course of administering the estate of Thomas Inett to Mary Ann Inett in part satisfaction of her share in that testator's estate.

What is meant by saying that a document or act is admissible because it is part of res gestae (1) has never so far as I am aware been explained in a satisfactory manner. I suspect it of being a phrase adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied.

At any rate in my judgment this memorandum is admissible and admissible not only in proof of the fact of delivery of

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(1) [Or, as recent learned writers prefer, "res gesta" in the singular. Either way it means in English neither more nor less than part of the story.—F. P.]

// Note

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the deeds to Mary Ann Inett but of the circumstances which led up to that delivery. The memorandum itself was executed contemporaneously to record the principal fact and the statements or declarations contained in it were made as part of and throw light upon and explain that principal fact—namely, the handing over of the deeds to Mary Ann Inett: see Taylor on Evidence, 11th ed., vol. i., para. 583, p. 401; and *Pinney* v. *Jones*. (1)

It was objected on behalf of the defendant that the memorandum, having been signed in March, 1902, ought not to be treated as contemporaneous with the handing over of the deeds to Mary Ann Inett, because Anne Inett had been dead for eighteen months. There is nothing startling in this lapse of time and I see no ground for regarding the memorandum otherwise than as a contemporary document.

The plaintiffs also rested their case on another ground—namely, that the statement in which Mary Ann Inett acknowledged the appropriation to her of the 300*l.* charge constituted a declaration by her against her pecuniary or proprietary interest. I think on this ground also the plaintiffs succeed. It was plainly more to Mary Ann Inett's interest to be paid a sum of 300*l.* as part of her share in the estate than to take over a mere charge for that amount; and, further, seeing that she was tenant for life of "Watkins" under Mutlow's will, her acknowledgment of the existence of the charge on "Watkins" was in disparagement of her interest in "Watkins" under that will: see *Taylor* v. *Witham*. (2) Nor upon this basis do I think that the acknowledgment can be separated from the other statements in the memorandum. They are all closely interconnected and explanatory, and the whole are in my view admissible.

—The further hearing of the action proceeded and after further argument, Lord Tomlin held that the memorandum, coupled with the other documentary evidence above referred to, was sufficient to establish the plaintiffs' claim to the charge and he made a declaration as asked and an order for foreclosure or sale in the form appropriate to the case of a charge by deposit of deeds.

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(1) (1894) 42 Am. St. Rep., 209.

(2) 3 Ch. D. 605.

Solicitors: *Hancock & Willis*, for *R. & C. B. Masefield, Ledbury; Smythe & Brettell*, for *S. Sirrell, Bromyard.*

H. C. H.

MAUGHAM J.
1931
Feb. 13.

In re ROBINSON.

BESANT *v.* THE GERMAN REICH.

[1930. R. 2302.]

Will—Gift for "disabled German soldiers"—Public Policy—Practicability—Scheme—Valid Charitable Gift.

A testator died on February 20, 1930, having by his will dated May 27, 1920, after certain gifts and provisions, devised and bequeathed his residue "to the German Government for the time being for the benefit of its soldiers disabled in the late war," or, should that be held void, "to General Smuts, upon trust to retain thereout for himself absolutely 1000*l.*, and upon trust as to the residue to apply the same at his discretion and in such manner as he may think fit for the benefit of any disabled Boers who have suffered through the South African war." On this summons by the plaintiff, as sole executor of the will, asking (inter alia) whether the devise and bequest to the German Government was void; if not, whether that Government or some other body took under the devise and bequest and whether or not by way of charitable trust; if the devise and bequest was invalid, whether the devise to General Smuts was invalid; and, if not, whether the gift of 1000*l.* to General Smuts was conditional upon his accepting the trust for the benefit of disabled Boers:—

Held, that the gift to the German Government was not void either for uncertainty or as contrary to public policy, but was a good and valid charitable gift.

New v. *Bonaker* (1867) L. R. 4 Eq. 655 and *In re Vagliano* [1905] W. N. 179 followed.

Observations on the meaning of the phrase cy près in relation to charities.

SUMMONS.

By his will dated May 27, 1920, Otway Robinson (hereinafter called "the testator") appointed Arthur Robert Besant (hereinafter called "the plaintiff") to be sole executor thereof, and after certain directions proceeded: "I bequeath to Alfred Sydney Harvey of Essex Street Whitstable aforesaid my piece of freehold land with two cottages thereon situate at Borstall Hill aforesaid. And I bequeath to him all my household furniture and household effects save such as I may hereby specifically bequeath, and the sum of 100*l*." And after giving certain legacies, he proceeded: "Whereas victorious and wealthy England is well able to provide for those who have been disabled in the late Great War, therefore I give devise and bequeath the rest residue and remainder of my property as a small gift to the German Government for the time being for the benefit of its soldiers disabled in the late war as, owing to the state of that country, these unfortunate men (the majority of them conscript under the former rigorous system of Prussian militarism) can only receive either meagre pensions or small help. In the event of this last devise and bequest being for any reason held to be void, then I give devise and bequeath the whole of such residue to General Smuts of the Transvaal, upon trust to retain thereout for himself absolutely the sum of 1000*l*., which I beg he will accept with my best respects, and upon trust as to the residue to apply the same at his discretion and in such manner as he may think fit for the benefit of any disabled Boers who have suffered through the South African war, as it is my desire to assist them in ever so small a way and to endeavour to dispel all ill-feeling that may possibly remain between the two races."

The testator died on February 20, 1930, and his will was proved on March 25, 1930, and this summons was taken out on October 31, 1930, on behalf of the plaintiff, for the determination (inter alia) of the questions whether the devise and bequest in the will of the rest, residue, and remainder of the testator's property "to the German Government for the time being for the benefit of its soldiers disabled in the late war" was void for uncertainty or otherwise; if not, whether the German Reich or some other and what body of persons took absolutely under the said devise and bequest; if not, whether the said devise and bequest created a valid charitable trust; if the said devise and bequest was invalid, whether the alternative devise and bequest to "General Smuts of the Transvaal" was invalid (*a*) as to the 1000*l.*, which he was directed to retain thereout for himself absolutely, and (*b*) as to the remainder which he was directed to apply "at his discretion and in such manner as he may think fit for the benefit of any disabled Boers who have suffered through the South African war"; and if the said alternative devise was valid, whether the gift of the said sum of 1000*l.* to General Smuts was conditional upon his acceptance of the trust for the benefit of disabled Boers.

Norman Daynes for the summons.

R. F. Roxburgh for the German Reich. The German Reich has submitted to the Court's jurisdiction, and is represented in this country, in its legislative, executive and judicial capacities, by its ambassador. There is no impracticability. The proposition that the Court will never direct a scheme for a foreign country is not in accordance with the authorities.

Fergus Morton K.C. and *Wilfrid Hunt* for General Smuts. This charity is one which cannot be thoroughly carried out. If the money were handed over to the Reich, there could be no control by the Court. The Court will not establish a scheme to be administered in a foreign country: *Attorney-General* v. *Sturge.* (1)

J. A. Mackintosh for Alfred Sidney Harvey.

F. R. Evershed for a half-brother of the testator. In this case it is necessary to settle a scheme. The Court cannot settle a scheme for a foreign country, but must be satisfied that there is a reasonable prospect of the trusts being carried out.

Stafford Crossman for the Attorney-General. The Attorney-General desires to support the view that this is a valid charitable trust: *New* v. *Bonaker.* (2) That case is an authority in favour of the contention now put forward. *In re Geck* (3) was a similar case. A trust for the benefit of a class does not necessarily involve giving something to every member of the class.

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(1) (1854) 19 Beav. 597.

(2) (1867) L. R. 4 Eq. 655, 660.

(3) (1893) 69 L. T. 819.

[He referred to *Emery* v. *Hill* (1), citing *Minet* v. *Vulliamy* (2); *Attorney-General* v. *Fraunces* (3); *Provost, Bailiffs, &c., of Edinburgh* v. *Aubery* (4); and *In re Vagliano.* (5)]

Morton K.C. on the cases. In such cases as *Attorney-General* v. *Fraunces* (3) the question was merely one of handing over the money to the particular body for its purposes. *In re Vagliano* (5) is of no real assistance, because it necessarily implied selection. *New* v. *Bonaker* (6) is not a decision on the point now before the Court.

MAUGHAM J. [having stated the facts :] The first question which arises for determination on the present summons is whether the devise and bequest of the residue of the testator's property to the German Government for the time being for the benefit of its soldiers disabled in the late war is void for uncertainty or otherwise. Various points have been argued, and properly argued, on behalf of those people entitled if this gift is void, and on behalf of the next of kin, on the view that both the alternative charitable gifts in the will are void. The first question, I think, which ought to be determined without regard to its possible effect on this question, is what the gift which I am now considering means, taking the language of the testator in its ordinary signification. Does it mean that this gift, which the testator himself describes as "a small gift to the German Government for the time being," is to be a gift of such a kind that every single one of the soldiers of the German Government disabled in the late war is to be given a proportion or quota of the gift in question; or does the testator mean, having regard to the fact that the gift is described as "a small gift to the German Government," and to the fact that it is "for the benefit" of its soldiers disabled in the late war, that the gift is for the benefit of a very numerous class of disabled soldiers, with a discretion as to its application which must be implied in the trustee proposed, who happens to be the German Government? In considering

(1) (1826) 1 Russ. 112.
(2) (1819) 1 Russ. 113n.
(3) (1866) W. N. 280.
(4) (1754) Ambler, 236.
(5) [1905] W. N. 179.
(6) L. R. 4 Eq. 655, 660.

that question it is proper to bear in mind that the testator must have known that a number of soldiers disabled in the late war had died; that a number of them might well no longer be in need of assistance; that some of them would have left Germany; and that for a variety of reasons it would be impracticable for the German Government to give a quota of this small gift to every soldier disabled in the war. To my mind, as a matter of common sense, and reading the words in what I think is their natural meaning, the gift is one for the general benefit, as I have said, of a numerous class, without directing that the trustees are to benefit every member of that class, and therefore there must be implied a wide discretion in the trustees as to the application of this fund. So construed, I see no reason to come to the conclusion that there is any uncertainty in the nature of the gift. I see no more difficulty in ascertaining whether a soldier has been disabled in a war than there is in determining the question whether a person, for instance, in a particular parish is poor, or whether people of a certain class are sick, or in determining, if the gift were within the exact words of the Statute of Elizabeth, whether a person came within the description of "sick and maimed soldiers and mariners." Accordingly I hold that the gift does not fail for uncertainty.

The next questions are whether the gift is charitable, having regard to the circumstance that people who are members of the class to be benefited are persons who reside out of the jurisdiction, presumably in the German Reich, or whether, as they are persons who fought against this country in the late war, it is against public policy to uphold such a gift as a charitable gift. And finally there is the question whether, having regard to the terms of the gift, there is a difficulty in handing over the money to the German Government, because this Court in such a case cannot properly formulate a scheme for the application of the fund.

It is abundantly clear that, whatever the construction which might have been placed upon the Statute of Elizabeth when that statute was passed in the forty-third year of that

Queen's reign, for at least 200 years the Courts have been in the habit of treating the phrase "charitable purposes" as not confined to charitable purposes within this realm. There are numerous authorities to that effect; and apart from cases of charities to be performed in the jurisdictions of Scotland and Ireland, there are several cases where the charity has been wholly foreign. In *New* v. *Bonaker* (1) the testator gave funds to the President and Vice-President of the United States and the Government of Pennsylvania upon trust to build and endow a college where a professor was to be engaged to inculcate and advocate the natural rights of the black people of every clime and country. It came before that eminent judge, Kindersley V.-C., in 1864, and he directed an inquiry whether or not the President and Vice-President of the United States and the Government of Pennsylvania would accept the trusts created by the will. It is obvious that if he had thought that such a charity was clearly bad he would never have directed that inquiry. The result of the inquiry was that the Government of the United States refused to accept the trust, and thereupon it was held by Malins V.-C. in *New* v. *Bonaker* (1) that it was impossible to settle a scheme, and that the charitable object altogether failed, but that was a mere accidental circumstance. There are numerous other cases on this subject, but I will cite only *In re Vagliano.* (2) That was a decision of Lord Wrenbury (then Buckley J.), relating to a gift by a testator of a very large sum to trustees who happened to be in this country, upon trust for charitable objects in the island of Cephalonia, "such objects to include the establishment of or aid in the establishment of or aids to churches, hospitals and schools, and also from time to time assistance to poor and aged persons for the time being resident in or natives of Cephalonia, with absolute power and discretion as to the disposal of such income for all or any of the purposes and objects aforesaid." The learned judge held that the gift was a good and valid charitable gift; that all the purposes suggested in the summons were proper purposes for the application of the

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(1) L. R. 4 Eq. 655.

(2) [1905] W. N. 179.

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income, and that as the fund and two of the trustees were in England it was a proper case for a scheme.

Accordingly, there is no objection to this gift by reason of the circumstance that the persons who are the objects of the charity are living abroad, and, having regard to my construction of the gift, the only objection on the ground of public policy that I can see is the fact that these people were once enemies. I shall say very little on that subject, because I am unable to see how it can be contrary to public policy to benefit persons who were once enemies but who have ceased to be such by reason of the fact that peace has been declared. These men are no longer our enemies, and the proposition that it is contrary to public policy to provide a benefit for them if they were disabled in the war would seem to require as a corollary that civilized countries ought not to take care of their enemies when they happen to be wounded. Such a proposition, of course, can hardly be stated. As regards the notion that to hold a gift of this kind to be valid is to encourage our enemies to fight against us in future, a like argument might be applied to a gift for discharged prisoners, on the ground that such a gift might be an encouragement to them to commit crimes in future. It seems to me on the contrary that to provide for enemy soldiers disabled in a hostile war is to be regarded in a true sense more as tending to maintain peace between the two countries than as tending to encourage people in bellicose ideas. Accordingly, I hold that there is no objection to this gift from the point of view of public policy.

There remains a question of technicality rather than of substance. I should point out that a scheme directed by this Court in relation to gifts for charitable purposes is not necessarily or, I think, generally a scheme for the application of the fund cy près. It is well known that a charitable gift in this country does not fail merely because there is an uncertainty as to the mode of carrying out the gift. In numerous cases of gifts for charitable purposes it is necessary to fill up a number of details in regard to which the testator or the donor has not described his wishes in clear terms. In

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such cases the gift does not fail, but the Court fills up the details of the donor's charitable intention by means of a scheme: there is no question of selecting objects cy près, because the objects to be benefited are the very objects pointed out by the testator, but the Court is doing no more than completing the trusts to carry out objects which, on the assumption with which I am dealing, have been indicated in sufficiently clear terms by the testator. In a case where the trustee is in this country there is of course no difficulty in providing or supplying the details of the trusts, even though the objects of the charity are resident abroad. *In re Vagliano* (1) is one of those instances. But if the trustee is abroad there is no power in the Court to direct a scheme to be settled, and the practice in such a case is to hand over the fund to the trustee to be applied according to the trusts of the will without directing a scheme. One of the earliest instances of that to which I have been referred is the case of *Provost, Bailiffs, &c., of Edinburgh* v. *Aubery* (2), a decision of Lord Hardwicke. Other cases where the same sort of point has been considered are *Emery* v. *Hill* (3) and *Minet* v. *Vulliamy.* (4) What the position would be if it were necessary in this case to apply the fund cy près I do not think it necessary to determine; but on the construction which I have put upon the gift it seems to me that if the objects of the fund were in England it would be possible for the trustees to carry out those objects without a scheme, and having regard to that view I see no difficulty in upholding the gift in all respects, and directing that the fund be handed over to the proper officer on behalf of the German Reich. I would add that the German Government, through its counsel, has stated that there will be no objection, upon the funds being handed over through diplomatic channels, to a statement being made on behalf of the German Government that the fund in question will be applied according to the wishes of the testator. In cases where the foreign trustee is an individual, it has

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(1) [1905] W. N. 179.

(2) Ambler, 236.

(3) 1 Russ. 112.

(4) 1 Russ. 113*n*.

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been the practice to ask for an undertaking. In the present instance the diplomatic assurance which I have mentioned seems to me to be the proper way of dealing with the case.

Solicitors: *Keene, Marsland, Bryden & Besant; Pennington & Son; Buckeridge & Braune; Cameron, Kemm & Co.; Treasury Solicitor.*

K. R. A. H.

FARWELL J.

1930

July 17.

In re LOPES.

BENCE-JONES *v.* ZOOLOGICAL SOCIETY OF LONDON.

[1930. L. 735.]

Charity—Zoological Society of London—Charter—Construction.

The objects of the Zoological Society of London as defined by its Charter are "the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom":—

Held, that the first object was clearly educational and the second object, being on construction merely in aid of the first, was also educational and (*semble*) it was educational in itself. The Society was therefore an educational charity, although in carrying out its objects it was found necessary to provide its pupils with food and amusement.

Held, also, that the second object necessitated and involved the upkeep and improvement of Zoological Gardens.

Consequently a bequest of money to the Society upon trust to apply the income for "the upkeep and improvement of the Zoological Gardens, and for the objects of the said Society," was a good charitable gift and not void for perpetuity.

ORIGINATING SUMMONS.

By his will dated June 14, 1915, the testator, George de Arroyave Lopes, after making certain specific and pecuniary bequests, including a bequest of his mother's picture after the death of his wife (who predeceased him), to the Zoological Society of London (hereinafter called "the Society"), gave the residue of his property to his trustees upon trust for sale and conversion, and to hold the net proceeds (thereinafter called "the trust fund"), upon trust to pay the income to his wife for life. After her decease part of the trust fund was to be appropriated to produce 300*l.* a year, to be paid his brother for life, and after his death to be transferred to St. Bartholomew's Hospital, the income to be applied for the encouragement of medical and clinical research. Subject thereto the trustees were, after the wife's decease, to hold the residue of the trust fund upon trust to transfer the same to the Society, the receipt of the treasurer or proper officer of the hospital or the Society to be a sufficient discharge to the trustees.

The testator then directed that the residuary trust fund should be invested by the Society, and known as the De Arroyave Fund, and that the income derived therefrom should be applied for "the upkeep and improvement of the Zoological Gardens and for the objects of the said Society."

The testator then directed the Society to hang his mother's picture in their board room, and to keep certain graves in repair. On their wilful neglect or failure to comply with these conditions the residuary trust fund was given over to St. Bartholomew's Hospital, to be employed by them as a fund for medical and clinical research.

The testator died a widower on September 1, 1929. After appropriating 8571*l.* India 3½% stock to produce the brother's annuity the residue was about 79,000*l.* Owing to the largeness of this amount, the trustees desired the directions of the Court before distribution.

On March 27, 1930, they issued this summons to determine:

(*a*) Whether they ought to transfer the residue to the Society without or upon the settlement of any scheme or to whom they ought to pay it.

(*b*) Whether the gift over in certain events to St. Bartholomew's Hospital was valid.

The only real question was whether the Society was a charity, as otherwise the gift with the income tied up in perpetuity would be void.

The objects of the Society as defined in its charter of incorporation of March 27, 1829, were "the advancement of zoology and animal physiology, and the introduction of new and curious subjects of the animal kingdom." It was incorporated for those purposes, and empowered to make by-laws not repugnant to the charter or the laws of the realm.

Certain by-laws were made, including the two following :—

Cap. 1, s. 12 : "No dividend, gift, division, or bonus, shall be made by the Society, unto or between any of its members."

Cap. 14, s. 1 : "An account of the business transacted at the meetings of the Society for scientific purposes, and the communications made to those meetings shall be published under the title, 'Proceedings of the scientific meetings of the Zoological Society of London.'"

The Society had recently acquired the Whipsnade Estate, Bedfordshire, where it was thought its animals could be kept under more natural conditions and perhaps happier circumstances than at the Zoo. For this purpose they had obtained the Zoological Society of London Act, 1928 (18 & 19 Geo. 5, c. xliii.).

The preamble stated that the Society were incorporated "for the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom"; and that they had interpreted their duties as including the instruction of the public by the exhibition of animals under the best conditions at their disposal; and that the present Zoological Gardens being inadequate they had purchased an estate to be developed and used as a zoological park under more favourable conditions for the breeding and exercise of animals, and as a sanctuary for British wild fauna and flora and for other purposes of the Society; and that they intended to grant the public facilities for admission to the estate when developed and equipped; and that for the advancement of the Society's objects it was expedient that the powers in the Act should be granted them.

Sect. 18, sub-s. 1, empowered the Society (inter alia) to make provision for conveying members of the public to the estate, with a right to charge for their conveyance. Sub-s. 2 empowered them to arrange for the provision and sale of refreshments of all kinds at the Whipsnade Estate and the Regent's Park Gardens or either of them on Sundays as well as on other days, and provided that as respects the Regent's

Park Gardens the Society should be deemed always to have had the powers of sub-s. 2.

Sect. 19 provided that the Society might apply their funds for the purposes of the Act.

The Society's income was derived from fellows' subscriptions, gifts and legacies, voluntary subscriptions and donations, and charges for admission, animal rides, and refreshments.

For its scientific work it maintained a laboratory, where research work in anatomy and pathology was carried on under the direction of a full-time trained pathologist and an anatomical fellow. Research on aquatic life was also carried on in the aquarium laboratory by an aquarium research fellow. It had also collected and maintained a library of scientific books and periodicals relating to zoology, reputed to be the most complete in the world, and had published continuously annual volumes of its scientific proceedings, all these things plainly tending to the advancement of education.

R. F. Roxburgh for the trustees.

Lionel Cohen K.C. and *Droop* for the Society. It is only necessary to look at the charter to see that the Society is an educational charity. Its objects are: "the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom," evidently to be introduced for that purpose for which zoological gardens are an obvious necessity. This is borne out by the Zoological Society of London Act, 1928, but the charter is sufficient in itself.

J. A. Reid for St. Bartholomew's Hospital. The Society and the hospital are both charities, and the gift and gift over are both good.

Morton K.C. and *Hubert A. Rose* for the trustee in bankruptcy of the brother, the sole next of kin. If the original gift is good we do not dispute the validity of the gift over.

The first purpose of the gift is "the upkeep and improvement of the Zoological Gardens." Now these gardens are not only used for the exhibition of animals; they are used for evening dinners and public entertainments. Surely the upkeep and improvement of gardens of that sort cannot be charitable.

The other purpose of the gift is "the objects of the said Society." What are those objects? They are twofold:—

(*a*) The advancement of zoology and animal physiology.

(*b*) The introduction of new and curious subjects of the animal kingdom.

Now object (*a*) is probably an educational charity. Object (*b*), if on construction it is meant to be purely ancillary to object (*a*), may also be educational. But it is not so expressed. As it stands the Society could lawfully carry on the business of a Jamrach, and introduce many more animals than required for educational purposes. The provision of elephants for riding is rather doubtful. Where is it to stop? The Society might lawfully set up a riding school for Mahouts, or even a circus. If this sort of thing is justified by the charter, as, on the face of it, it is, the Society is not a charity, however beneficial to the public its activities may be. The gift is therefore void for perpetuity.

Lionel Cohen K.C. in reply. The important point is to distinguish between the objects of the charter and the proper means of obtaining those objects. The charter really means that the objects are "the advancement of zoology and animal physiology and"—for this purpose—"the introduction of new and curious subjects of the animal kingdom." That is clearly an educational charity, and it certainly necessitates and involves the upkeep and improvement of Zoological Gardens for the exhibition of the animals.

So far as the provision of food and amusement subserves the educational purpose by inducing pupils to attend, it is within that educational purpose. If the Society goes beyond this, which is not admitted, it is overstepping its charter, and is liable to be pulled up by the Charity Commissioners or the Attorney-General. But it is still a charity under the charter, however it errs.

[He referred to *Beaumont* v. *Oliveira* (1) and *Harrison* v. *Southampton Corporation*. (2)]

Stafford Crossman for the Attorney-General.

(1) (1869) L. R. 4 Ch. 309.

(2) (1854) 2 Sm. & G. 387.

FARWELL J. [after stating the facts]. The testator's brother, as sole next of kin, represented by his trustee in bankruptcy, says that the fund is given to the Society for two objects—namely, (*a*) the upkeep and improvement of the Zoological Gardens, and (*b*) the objects of the said Society. He points out that the charter contains two objects—namely, first, "the advancement of zoology and animal physiology"; and, secondly, "the introduction of new and curious subjects of the animal kingdom." He does not dispute that the first object may have a true educational benefit and be charitable. But he rightly says that if the fund can lawfully be applied for a non-charitable purpose the whole gift is not charitable, and he says that the upkeep and improvement of the gardens is not a charitable purpose. He also says that the Society is not limited to introducing new and curious animals for the purpose of public education, but may introduce them to provide amusement for which it is paid, and that on the whole, having regard to the facts that the Society is keeping a restaurant for visitors, is keeping the gardens open on certain week days to a late hour and providing evening meals, is providing animals to ride on, and doing non-charitable things of that kind, the gift is not charitable, because it might lawfully be expended on non-charitable objects.

I feel the force of that argument, but I have first to consider what is the main object of the Society which it is bound to carry out under its charter.

Its first object is "the advancement of zoology and animal physiology." That is clearly educational, for the advancement of scientific knowledge, and therefore charitable.

The second object is "the introduction of new and curious subjects of the animal kingdom." That object again, having regard to the form of the charter, is charitable.

In the first place, although the copulative "and" is used and no doubt imports two objects, nevertheless I think that the second object must be read in connection with the first which may to some extent necessitate it.

In the second place, I think that the introduction here of non-indigenous animals, exhibited under proper conditions, is distinctly an educational object. It must widen the mind and outlook of every one to see, in the flesh, animals now becoming scarce in many parts of the world, which otherwise they might not see at all. Taking a broad view of the Society's objects I am satisfied that they are charitable, on the ground that they are for the advancement of education.

If that be so the gift for the upkeep and improvement of the Zoological Gardens is to enable the Society to carry out those charitable objects properly and effectively. The second object clearly does not contemplate the introduction of new and curious animals here, to be let loose in this country. They must be kept in proper places and properly looked after. For that purpose there must be Zoological Gardens which must be properly kept up and improved. The gift for that purpose must therefore be read as a gift for the upkeep and improvement of the Zoological Gardens for the purpose of carrying out the objects stated in the Society's charter. Those objects being charitable, the upkeep and improvement of Zoological Gardens necessary thereto must also be charitable.

The next of kin says that the Society has built refreshment rooms, caters for the public, and provides amusement by way of riding on animals, and that that sort of thing is not charitable. But I must look at the real object of the Society and see whether that object is being carried out.

Now the real object is educational and therefore charitable, and none the less so because it is necessary to provide food for persons who attend (inter alia) for educational purposes, and this food must be paid for. It may also be necessary, in order to attract younger persons to be educated, that some form of amusement, such as riding on animals, should be provided. A ride on an elephant may be educational. At any rate it brings the reality of the elephant and its uses to the child's mind, in lieu of leaving him to mere book learning. It widens his mind, and in that broad sense is educational. At any rate it would be wrong to say that this Society is not a charitable Society because its money is partly applied to objects which in themselves may not be charitable so long as those things are done, and can only be done, by the Society as part of the whole educational purpose for which it exists. The whole fund must be expended upon educational objects and what is necessary thereto. The next of kin suggested that the Society could lawfully keep one very small portion of the gardens for a laboratory and turn the rest into a circus. But that would not be educational or permissible within the charter.

In these circumstances, looking at the question broadly, I am satisfied that the gift is a good charitable gift. The gift over is also good.

[The drawing up of the order was postponed till July 25, 1930, in order to incorporate a scheme. The order declared the validity of the trust and the gift over, and, the Attorney-General not objecting, it was ordered by way of scheme that the trustees should transfer the residuary fund to the official trustees of charitable funds on trust to pay the income to the Society, the Society undertaking to apply it for the upkeep and improvement of the Zoological Gardens and for the objects of the Society and to perform the conditions as to the picture and the graves.

And from time to time, but not more than twice a year, to admit persons authorized on behalf of St. Bartholomew's Hospital to the Society's Board Room for the purpose of ascertaining that the picture remained hung there.

Liberty for the Governors of St. Bartholomew's Hospital to apply for a new scheme in the event of a wilful breach of the conditions as to the picture and graves. Solicitor and client costs of all parties out of the residuary trust fund.]

Solicitors: *Corbould, Rigby & Co.; Taylor & Humbert; Stow, Preston & Lyttelton; Wilde, Wigston & Saptes; Treasury Solicitor.*

G. R. A.

MAUGHAM J.

1931
March 26.

In re WOODS.

WOODS *v.* CREAGH.

[1930. W. 4490.]

Will—Construction—Gift of Residue in Trust for Testatrix's four Daughters A., B., C. and D., or such of them as should be living at her Death in Equal Shares—Class Gift—Revocation by Codicil of Bequest to B.—No Lapse.

A testatrix, who died in 1873, by her will made in 1866 gave her residuary estate in trust for her four daughters A., B., C. and D., or such of them as should be living at her death in equal shares.

By a codicil the testatrix revoked her will so far as regarded the bequest to B., and substituted therefor a legacy of 100*l.*, and in other respects confirmed her will. Each of the four daughters, including B., survived the testatrix:—

Held, that, whether or not the bequest in trust for the testatrix's four daughters was, in the technical sense of the phrase, a class gift. the share bequeathed in favour of B. did not lapse, but the whole of the residue went to the other three daughters.

ADJOURNED SUMMONS.

Sophia Woods, widow, by her will dated March 15, 1866, devised and bequeathed her real estate and all her residuary personal estate to her son Hamilton Woods upon trust that he should sell and convert the same into money and should invest the net moneys to be produced by the sale and conversion thereof and should out of the income of her residuary estate pay a certain annuity of 40*l.* to her son Frederick Woods. The testatrix then declared that from and after the determination of the trust of the annuity and in the meantime subject thereto the trustee or trustees of her will should stand possessed of her residuary trust funds "in trust for my four daughters Amy Brudenell Woods, Sophia Woods, Julia Ann Woods and Amelia Woods or such of them as shall be living at my death in equal shares." Then there followed a proviso that such shares should not vest in her said daughters as their absolute property, but should be held by the trustees for the time being upon certain trusts therein declared for the benefit of each of her said daughters, her husband and children who should attain the age of twenty-one years; and it was provided that, in case there should be no child of such daughter who should attain a vested interest, as well her original share as any share or shares which might accrue to her under the proviso should accrue and go over to the testatrix's other children who should be then living, share and share alike, the share or shares so accruing to any of her said daughters to be held upon the trusts declared concerning her original share.

By a codicil made in 1867, the testatrix, after reciting the gift by her will of her residuary trust funds to her said four daughters or such of them as should be living at her death in equal shares and also the bequest of the annuity to Frederick Woods, revoked her will so far as regarded the bequests to her daughter Sophia Woods and her son Frederick Woods, and substituted in place of the bequest to Sophia Woods a legacy of 100*l.* and substituted in place of the bequest to Frederick Woods the annual sum of 50*l.*

The testatrix died on May 30, 1873. Each of her four daughters named in the will survived the testatrix and afterwards died. Amelia Woods, who was the first to die, died without having been married, on May 14, 1896.

By an order made by North J. on July 29, 1897, upon an originating summons entituled "*In re Woods: Turner* v. *Woods* (1897, W., No. 787)," it was declared that upon the true construction of the will and codicil and in the events which had then happened, Sophia Woods, who was then the wife of Henry Turner (since deceased), became, on the death of her sister Amelia Woods, beneficially interested in one-third of the share of the testatrix's residuary estate which was held in trust for Amelia Woods for life with remainders over.

Amy Brudenell Woods and Julia Ann Woods died on May 23, 1911, and March 2, 1921, respectively, neither of them having been married, and Sophia Turner, who was the last of the four daughters to die, died a widow on October 25, 1928, having by her will appointed the defendant William John Creagh executor thereof.

Sophia Turner had three children, all of whom attained the age of twenty-one years—namely, Henry S. Turner, who died in 1895, the defendant Basil William Turner, and Hugh A. Turner, who died in 1903.

This summons raised the question (amongst others) whether, upon the true construction of the will and codicil, the testatrix died intestate as to the share of her residuary estate given by the will in trust for Sophia Turner, her husband and children.

C. J. Parton for the plaintiff who (with the defendant Alice Mary Woods) was one of the present trustees.

Charles Jenkins K.C. and *Alfred Adams* for the defendants William John Creagh and Basil William Turner. The bequest for the four daughters is in form a class gift, and only those members of the class who at the death of the testatrix were capable of taking, take. In the present case, owing to the revocation of the bequest to her, Sophia Turner was at the death of the testatrix incapable of taking: *In re Coleman & Jarrom* (1); *Shaw* v. *M'Mahon.* (2) But, whether or not this is a class gift in the technical sense of the phrase, the bequest is to the four named daughters with the benefit of survivorship: see Jarman on Wills, 7th ed., vol. i., p. 405. The effect of the revocation of the bequest to Sophia Turner is that the will must be read as if her name had never been inserted in the bequest of the residue (*In re Hornby* (3)), with the result that the other three surviving daughters took the whole residue. Then, in that event, under and by virtue of the provisions in the will for accruer and in the events which have happened of her three sisters dying without having been married and as a consequence of the order of North J. of July 29, 1897, Sophia Turner became beneficially entitled to the whole of the testatrix's residuary estate, including the share bequeathed by the will in trust for Sophia Turner, her husband and children.

R. R. Formoy for the defendant Alice Mary Woods, the personal representative of the testatrix's deceased daughter

(1) (1876) 4 Ch. D. 165.
(2) (1843) 4 Dr. & W. 431.
(3) (1859) 7 W. R. 729.

Julia Ann Woods, one of the next of kin of the testatrix and appointed to represent the next of kin. This is not a class gift. To constitute a class the members must come under some general description and bear a certain relation to the testator. Here the gift is to four persons nominatim as tenants in common with an alternative gift only in the event of any of the named persons dying before the testatrix. This alternative gift does not make the original gift a class gift. By the codicil the bequest to Sophia is struck out of the will and there is no expression in either the will or the codicil which shows that the testatrix intended that the share, the bequest of which was so revoked, should go over and be added to the other shares in the residue, with the consequence that Sophia's share is undisposed of: *In re Forrest.* (1)

MAUGHAM J. The point which I have to determine is, I think, not free from doubt, and I am desirous of not deciding more than I must necessarily decide.

The question is, what is the effect of a codicil revoking a gift of a share given to a daughter in the testatrix's residue? By her will, which she executed as long ago as 1866, the testatrix Sophia Woods, a widow, bequeathed—stating it shortly—her residue in trust for her four daughters Amy Brudenell Woods, Sophia Woods, Julia Ann Woods and Amelia Woods "or such of them as shall be living at my death in equal shares." She then proceeded to settle the shares of those daughters upon trusts which for the present purpose are immaterial. By her codicil, dated August 21, 1867, after reciting the gift by her will of her residue to her said four daughters or such of them as should be living at her death in equal shares and also the bequest of an annuity of 40*l.* to her son Frederick Woods, she proceeded as follows: "Now I revoke my said will so far as regards the said bequests to my daughter Sophia Woods and my son Frederick Woods and substitute in the place of the said bequest to my daughter Sophia Woods a legacy of 100*l.* which I hereby bequeath and direct to be paid free of legacy duty." After some other dispositions, in other respects she confirmed her will.

(1) [1931] 1 Ch. 162.

The question that now arises and which in fact arose on the death of the testatrix, which took place in the year 1873, is this: Having regard to the revocation of the gift to Sophia Woods (who I should mention afterwards became Mrs. Sophia Turner), did the residue go in thirds between the three other daughters, Amy Brudenell Woods, Julia Ann Woods and Amelia Woods, all of whom survived the testatrix, or is there an intestacy as regards the one-fourth share to which, but for the codicil, Sophia Woods would have become entitled to, since she too survived the testatrix? It is well settled that if there is a gift of residue to four daughters or, indeed, to any persons described nominatim, as, for instance, a gift of residue to A., B. and C. in equal shares, if one of the three dies before the death of the testator, there is an intestacy. It is also well settled that, if in such a case the testator by his codicil revokes the gift to one of the persons and adds no other disposition, there is an intestacy, just as there would be in the case of the death of one of those persons before the death of the testator. The question which I have to decide here is, what is the effect of this particular codicil, having regard to the fact that the residue is given in trust for the four daughters, naming them, "or such of them as shall be living at my death in equal shares." It does not seem to me necessary for the present purpose to decide whether the gift to the four named children or such of them as should be living at the death of the testatrix can properly be described as a class gift. Prima facie, the definition of a class gift, which is to be found in *Kingsbury* v. *Walter* (1) confines the phrase to persons who are included and comprehended under some general description and bear a certain relation to the testator. In general, but this of course is not more than a generality, a class within the meaning of the phrase as used by Lord Halsbury in that case is capable of diminution or increase, either by events prior to the testator's death or by events prior to the death of the tenant for life, as the case may be. On the other hand, it may well be that a class is not capable of increase, so that it is not necessary, in order

(1) [1901] A. C. 187.

that a gift should be one to a class, that there should be a capability of increase. This much, however, may be asserted of a gift to A., B. and C. and D., "or such of them as shall be living at my death," that the testator is looking at them, if not as a class in the technical sense, at any rate as a group of persons who have got to be living at the death of the testator in order to take any interest under the bequest; and, if the testator is so regarding the persons named and by his codicil uses language which shows that one of the persons named is to have no benefit under the gift contained in the will, it does not, in my opinion, take a very long step to conclude that the other members of the group, using the neutral term, shall take the whole of the interest which he in the first instance was desirous of giving to those of the group who should be living at his death. In the case of a true class gift, where there is a revocation by a codicil of a gift to one of the members of the class, it is now well settled that there is no lapse, but that the whole goes to the other members of the class. In the case of *In re Coleman & Jarrom* (1) Sir George Jessel, after an elaborate consideration of nearly all, if not all the material cases, came to the conclusion that, where there is a gift to a class, the proper view of the testator's intention is that he intends that the class shall take, so far as the law allows, and, accordingly, in effect, he is saying that the members of the class who are living at the death of the testator and are capable of taking are the persons to take. He cites, in particular, a decision in *Shaw* v. *M'Mahon* (2) by Sir Edward Sugden, where the testator (who was a former Master of the Rolls in Ireland) had given a fund equally amongst his children living at his death and by a codicil revoked the gift to one of the children, and Sir Edward Sugden, who was then Lord Chancellor of Ireland, held there was no intestacy, but that the whole fund went to the other children. To my mind the ground of the decision in *In re Coleman & Jarrom* (1) and in the other cases referred to by Sir George Jessel, is that, in a case where there is a gift to a class, the presumption is that the testator only

(1) 4 Ch. D. 165.

(2) 4 Dr. & W. 431.

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desires those members of the class who shall be alive at his death to take; and from that the Court concludes that he also desires that only those members of the class who are living at his death and capable of taking shall take. In my opinion the same result should follow in such a case as the present. I will add that I do not think there is any solid ground for doubt as to the intention of the testatrix. It will be observed that she revokes her will so far as regards the bequest to her daughter Sophia and substitutes in the place of that bequest a legacy of 100*l.* If one is to read that into the will, is there any doubt that in effect the will must be read as if, when she comes to dispose of her residue, she gives 100*l.* to her daughter Sophia Woods to be paid out of the fund and then provides that the trustees are to stand possessed of the rest of her trust moneys, stocks, funds and securities in trust for, not her four daughters, for as regards one the bequest is revoked, but in trust for her three daughters who shall be living at the date of her death in equal shares? Accordingly, in my opinion there is here a sufficient indication of the intention of the testatrix that only those members of the class or group of her four daughters who are capable of taking shall take and that they shall take the whole, and I so decide.

Solicitors: *Albert M. Oppenheimer; Bell, Brodrick & Gray.*

H. C. H.

In re McKEE.

PUBLIC TRUSTEE *v.* McKEE.

[1930. M. 2721.]

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MAUGHAM J.
Feb. 4, 19.
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April 22, 23;
May 11.

Will—Contingent partial Intestacy—Residue given to Testator's surviving Brothers and Sisters subject to Wife's Life Interest—Death of Brothers and Sisters in Lifetime of Wife—Resulting partial Intestacy—Wife's Rights in Property undisposed of—No immediate Sale of Reversionary Interest—Fund for Payment of Debts and Funeral and Testamentary Expenses—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 33, 46, 49.

By his will a testator who died in 1928, after making certain bequests, devised and bequeathed all his real and personal estate not otherwise disposed of to his trustee upon trust for sale and conversion, and after paying his funeral and testamentary expenses, debts and legacies, to invest the net residue, and to stand possessed of the net residue and the investments thereof upon trust to pay the income to his wife for life, and after her death to divide the same between his surviving brothers and sisters. The last of the brothers and sisters died in 1930. The widow was still living. On the construction of the will surviving brothers and sisters was held to mean brothers and sisters surviving the widow, and there was therefore an intestacy as to the reversionary interest in the testator's residuary estate expectant on the widow's death:—

Held (affirming the decision of Maugham J.):—

(1.) That the reversionary interest ought not to be forthwith sold;

(2.) That the funeral and testamentary expenses and debts were not payable out of the proceeds of the reversionary interest as property undisposed of by the will but out of the estate before the residue was ascertained;

(3.) That the widow was not entitled to any immediate payment in respect of the property undisposed of under ss. 46 and 49 of the Administration of Estates Act, 1925, but that by virtue of these sections her personal representatives would on her death be entitled to receive thereout 1000*l.* with interest at 5 per cent. per annum from the testator's death but nothing further.

ADJOURNED SUMMONS.

The following statement of the facts is substantially taken from the judgment of Maugham J.

The testator died on August 6, 1928. By his will dated July 8, 1912, after appointing the Public Trustee to be the executor and trustee thereof, and after making certain bequests, he devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustee upon the following trusts: "Upon trust that my trustee shall sell call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the moneys produced by such sale calling in and conversion and out of my ready money pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and shall with the consent in writing of my wife during her life and afterwards at the discretion of my trustee invest the residue of the said moneys with power from time to time with such consent or at such discretion as aforesaid to vary such investments and shall stand possessed of the residue of the said moneys and the investments for the time being representing the same upon trust to pay the income thereof to my wife during her life and after her death to be equally divided between my surviving brothers and sisters. . . . ."

One only of the brothers and sisters of the testator survived him—namely, Emily McKee, who died on January 8, 1930. Following certain authorities Maugham J. held that upon the true construction of the will, the phrase "my surviving brothers and sisters" refers to brothers and sisters who should be living at the time for division, that is at the death of the widow: and the widow being still alive and all the brothers and sisters of the testator being now dead, it follows that subject to the life interest given to the widow the residuary estate of the testator is undisposed of.

Upon this decision three questions are raised by the summons: (*a*) Whether the reversionary interest in the said residuary estate expectant on the death of the widow ought forthwith to be sold, and the proceeds of such sale applied as property undisposed of in accordance with the provisions of the Administration of Estates Act, 1925; (*b*) whether the widow is entitled to be paid out of such proceeds of sale the sum of 1000*l.*, together with interest thereon at 5*l.* per cent. per annum from the date of the testator's death or from the death of Emily McKee, or from what other date, and to receive during the remainder of her life the income of the residue of such proceeds of sale; (*c*) whether the funeral and testamentary expenses and debts of the testator are primarily payable out of such proceeds of sale in exoneration of the life interest of the widow in the said residuary estate or are payable out of the testator's estate before the residue thereof is ascertained.

By direction of the judge the summons was amended so as to ask the further question whether on the death of the widow: (i.) the net sum of 1000*l.* with interest thereon at the rate of 5*l.* per cent. per annum from the date of the testator's death, and (ii.) any other and what sum ought to be paid out of the residuary estate of the testator to the personal representatives of the widow.

J. Neville Gray for the Public Trustee.

Cleveland-Stevens K.C. and *A. C. Edgar* for the widow.

Manning K.C. and *C. R. R. Romer* for a legatee under the will of Emily McKee.

Sir Thomas Hughes K.C. and *Rand* for other persons claiming under the Administration of Estates Act, 1925.

Cur. adv. vult.

1931. Feb. 19. Maugham J. [after stating the facts:] It should be observed that at the death of the testator on August 6, 1928, certain of his brothers and sisters being then alive, it was impossible to say that the will did not effectively dispose of the whole of his property. This, of course, constantly happens where life estates or similar interests are created by a will and the ultimate takers cannot be ascertained till a future date. Indeed it may be fifty years or even more before it is known that a testator in the events which have happened has left property which passes as on his intestacy. In such a case considerable difficulty arises in applying certain sections of the Administration of Estates Act, 1925.

It is important to note in the first place that, by s. 45 of the Act, the whole of the old law as to descent or devolution of the real and personal estate of a person who dies intestate in whole or in part after 1925 (except as respects entailed

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interests and as respects descent from a lunatic or defective living on January 1, 1926) is abolished; and statutes relating to descent or devolution, including the Statutes of Distribution, are expressly repealed in cases where the death occurs after the commencement of the Act (with an exception as to lunatics or defectives not material to the present purpose). It is therefore, I think, impossible to hold that Part IV. of the Act which is headed "Distribution of residuary estate," does not apply to items of property as to which it may be determined many years after the death that they devolve as on intestacy; for the old law no longer applies. On the other hand, it does not follow that Part III., which relates to "Administration of assets," applies to the case of a testator as to whom it cannot be asserted at the date of his death that he is partially intestate. Sect. 33 establishes that "on the death of a person intestate as to any real or personal estate" there is imposed an immediate trust for sale and conversion, and by sub-s. 7 it is provided that where the deceased leaves a will the section has effect "subject to the provisions contained in the will."

I pause here to make two observations. The first is that this phrase is more general than the well-known qualification "unless a contrary intention is expressed in the will." The second is that the object of the legislature in passing this Act was of a remedial character; and there is ample authority for the view that if in such a case the intention of Parliament is not clear, the Court is justified in giving a benevolent interpretation to the language used with a view to avoid grave inconvenience or injustice, provided that this can be done without violence to the express terms and to the spirit of the statute. With this in mind I approach the construction of the Act under consideration with the remark that in a case of only partial intestacy, whether it be immediate (i.e., evident at the date of the death) or contingent (i.e., dependent on events subsequent to the death), the will is the controlling instrument, and I think the statutory provisions of ss. 33, 46, 47 and 48 of the Act ought only to be applied so far as they can be applied consistently in all respects with the terms of the will.

Taking the present case as an example of what will frequently occur, a question that presents itself in limine is whether the statutory trust for sale with the necessary corollary as to the application of the proceeds of sale (sub-s. 2) can subsist in a case where the testator has by his will given his real and personal property upon trust for conversion. There cannot, I think, be two subsisting trusts for conversion of the testator's estate and for application of the proceeds with, it may be, different incidents. For example, there may be in the will a requirement as to the consent to the sale of the tenant for life, or a special provision as to the legacies which are to be discharged out of the proceeds or a number of other matters not provided for in s. 33. I hold that the words in sub-s. 7 are intended to have the effect in such a case as the present of preventing sub-ss. 1 and 2 having any application, at any rate at the death of the testator. I may observe parenthetically that, if the will is so drawn as to give property in specie to any beneficiary for life or for some other period, the sub-sections pro tanto must obviously be superseded.

The sub-sections may no doubt be construed as applicable to any item of property as to which there is an immediate intestacy, in the sense above explained; for there would be no serious difficulty in applying an immediate trust for sale to that item of property, though a question of doubt would arise as to the application of sub-s. 2, if the testator had by necessary implication directed his funeral and testamentary expenses and debts to be paid out of the proceeds of sale of property which he had disposed of. But that question is not now before me. It is suggested that in the case of a contingent partial intestacy, such as I have to deal with in the present case, the statutory trust for sale may apply to the property undisposed of. As I have already indicated there is plainly great difficulty in the contention that in such a case the statutory trust for sale arises at the date when the intestacy became certain or probable; for s. 33, sub-ss. 1 and 2, are framed as if they applied only as from the death of the testator. Moreover, to take one out of many instances of the result of the suggestion I am testing, the funeral expenses of the deceased have, under sub-s. 2, to be paid out of the proceeds of the statutory trust for sale. It does not seem to be possible to suppose that the legislature can be contemplating that the various sums paid for funeral and testamentary expenses and debts out of the general estate pursuant to the provisions of the will must be recouped out of the item of property in question at some future date; nor is this, in my opinion, giving full effect to the provisions contained in the will. In the alternative it is suggested that in such a case there is an immediate statutory trust for sale of any interest as to which the testator may ultimately prove to be intestate. Such a reversion, using the word in a popular sense, might of course be sold however remote the contingency of intestacy might be. There is, however, nothing whatever in the Act to suggest that this is the intention, and it would lead in some cases to very remarkable results. I doubt whether the direction in s. 33, sub-s. 1, that a reversionary interest is not to be sold until it falls into possession is intended to refer to anything except reversionary interests properly so called forming part of the intestate's estate; but the direction tends to negative the suggestion which I am considering, and having regard to the complete absence of anything in the Act in support of it, and to the great inconvenience that would be caused by adopting it, I have come to the conclusion that a trust in the usual form for sale and conversion of the residue of the real and personal estate of a testator contained in his will altogether precludes the operation of the statutory trust for sale under s. 33, sub-s. 1. The testator has by his will created the trust for sale and conversion of his estate, and has stated how the residue after payment of debts, etc., is to be applied, at any rate for a period. It is not, I think, consistent with this provision that the reversion, so to speak, in a fund or residue so created is itself to be sold, for this reversion never was in an accurate sense a part of the estate of the testator at the time of his death.

There is in the present case an effective trust for conversion and an effective life interest created by the will, and for the reasons given it follows that the statutory trust for sale mentioned in sub-s. 1 of s. 33 is not applicable, and that sub-s. 2 is not applicable, because the testator has stated how the funeral and testamentary expenses and debts and the legacies bequeathed by his will are to be paid. Accordingly I think that the first two questions above referred to and the first part of the third question must be answered in the negative, inasmuch as to answer them in the affirmative would be to disregard the provisions of sub-s. 7 of s. 33 according to the construction which I place on the words "subject to the provisions contained in the will." I may point out, as regards the second question, that it asks whether the widow is entitled to her 1000*l.* out of the proceeds of sale of the so-called reversionary interest, and, in my opinion, there is no right in the widow to call for such a sale.

A question will however arise on the death of the widow whether, when the testator's residue falls into possession, her personal representatives will be entitled under the provisions of the Fourth Part of the Act to receive the sum of 1000*l.* and any other interests given to the widow of an intestate by that part of the Act. This though a future question is one which must arise, and I think I ought not to decline to decide it. It must be noted that the phrase "the residuary estate of an intestate" is defined in s. 33, sub-s. 4. As I have indicated, in such a case as the present there is no "residuary estate of the intestate" as so defined, since that estate is ascertained by reference to a statutory trust for sale which, in my view, is inapplicable to such a case as the present. On the other hand s. 49 provides that where any person dies leaving a will effectively disposing of part of his property the Fourth Part of the Act, which does not include s. 33, "shall have effect as respects the part of his property not so disposed of," subject to two provisions, the first of which requires issue of the deceased to bring beneficial interests acquired under the will into account, and the second of which is immaterial for the present purpose. In my opinion, therefore, and having regard to the circumstance that I have already mentioned, that the Statutes of Distribution and like statutes and provisions have been abolished, s. 49 does provide that the property which will fall in on the death of the widow, though not within the phrase "the residuary estate of an intestate," must be subject to the provisions of s. 46 of Part IV. The words "subject to the provisions contained in the will" must be borne in mind. The will it is true has given the widow a life interest in the testator's residue; but it seems to me that it is consistent with that provision, though it may be a surprising result, that on the death of the widow the residue then undisposed of shall stand charged with the payment of a net sum of 1000*l.* to her, or rather to her personal representatives, with interest thereon from the date of the death at the rate of 5 per cent. per annum until paid. Support is gained for this view by the fact, above alluded to, that the issue of the deceased have to bring into account any beneficial interests acquired under the will of the deceased, while the widow, or widower, has not. It does not, in my opinion, follow that the widow has any interest under the subsequent provisions of s. 46, sub-s. 1. According to the opinion I have expressed there is nothing in the Act requiring a sale of the reversionary interest in question before the death of the widow; and, since under s. 49 the interest is to be held "subject to the provisions contained in the will," my view is that on a fair construction of those words the widow is not entitled to any life interest in the property which will fall in on her death nor on its estimated value as at the death of the testator. There is no provision for any notional conversion as from the death of the testator, nor, I think, any reason for thinking that any such provision, elaborate as it would need to be, should be implied. She is therefore, I think, precluded from claiming any further interest beyond the 1000*l.* and interest thereon in the property falling into possession upon her own death. The personal representatives of the brothers and sisters of the testator who survived him may be willing to come to some agreement with the widow, but with this, of course, I am not concerned.

K. R. A. H.

The widow appealed, and there was a cross-appeal by the other persons claiming under the Administration of Estates Act, 1925. The appeals were heard on April 22, 23, 1931.

Cleveland-Stevens K.C. and *A. C. Edgar* for the appellant. Except as to the appellant's life interest, there was here an intestacy under the Administration of Estates Act, 1925: *In re Sullivan.* (1) The intestacy being as to a reversionary interest the principle of *Rowlls* v. *Bebb* (2) applies.

[Romer L.J. Is not the whole question what the Act says is to be done with the interest?]

In such a case as this s. 49 of the Administration of Estates Act, 1925, applies, and provides that Part IV. of the Act shall have effect as respects the property not disposed of "subject to the provisions contained in the will" and subject to the modifications there mentioned. The effect of the first modification is that beneficial interests acquired under the will are only to be brought into account in the case of issue, and under the second the personal representative is made a trustee for the persons entitled under Part IV. in respect of the part of the estate not expressly disposed of. This brings in s. 46, and the part of the estate undisposed of is to be held by the personal representatives upon trust for the persons who under s. 46 would be entitled to residuary estate. By s. 46, sub-s. 1 (i.), the appellant is therefore entitled to 1000*l.* with interest at 5 per cent. from the date of the testator's death and to a life interest in the balance of the property undisposed of, and it is only subject to her interests that the persons entitled under s. 46, sub-s. 1 (v.), take. It has been suggested that s. 33 applies, but that is not part of Part IV. of the Act. It is true that s. 33 is shown by sub-s. 7 to apply to partial intestacies, but under the language of sub-s. 1 it only applies "on the death of a person intestate as to any real or personal estate." This must mean that there is to be an immediate intestacy as to some part of the estate. Here the testator was at his death only contingently intestate. It became certain that there would be an intestacy when the testator's surviving sister died on January 8, 1930, but the intestacy will only arise at the death of the appellant. It is s. 49 that applies here and not s. 33. This view is supported by the difference in the phraseology in the two sections. Sect. 33 applies to an intestacy as to "any real or personal estate," that is, as to any of the intestate's assets, s. 49 applies to "the part of his property not disposed of," and by s. 55, sub-s. 1 (xvii.), "'property' includes . . . . any interest in real or personal property." If s. 33 applies here it is difficult to see any use for s. 49. Further, Part III., which contains s. 33, relates only to the administration of an intestate's estate, while Part IV. deals with its distribution.

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(1) [1930] 1 Ch. 84.

(2) [1900] 2 Ch. 107.

The appellant's contention is that the reversionary interest should be sold, and that she should receive 1000*l.* out of the proceeds with interest from the testator's death and an immediate life interest in the balance.

[Romer L.J. The objection to s. 33 is presumably that under s. 33, sub-s. 1, a reversionary interest is not to be sold until it falls into possession.]

Even if s. 33 applied, it contains nothing to injure the appellant's case. By s. 33, sub-s. 7, it only applies "subject to the provisions contained in the will." The will in this case contains a trust for sale and a direction for payment of funeral and testamentary expenses and debts and legacies and for investment of the net proceeds. Therefore the corresponding directions in s. 33, sub-ss. 1, 2 and 3, do not apply. Further, the reversionary interest here is not such a reversionary interest as is contemplated by s. 33. That refers to a reversionary interest belonging to an intestate. Here the property belonged to the testator absolutely, and the reversionary interest is only the extent of the interest of which he failed to dispose. Further the reversion here was a contingent interest for eighteen months after the testator died.

[Romer L.J. If s. 33 does not apply, what power is there to sell the reversionary interest ?]

It is suggested that s. 49 confers such a power on the personal representative, who as trustee of the property undisposed of must do whatever is proper for the purpose of its distribution. But if there were no power of sale the appellant has an alternative claim that her estate should receive 1000*l.* at her death with interest from the testator's death, as Maugham J. has decided; but that in addition her estate should receive in respect of her life interest in the reversionary interest a capital sum arrived at in accordance with *In re Lord Chesterfield's Trusts.* (1) It is true that the application of that case is excluded by s. 33, sub-s. 1, but for the reasons already given that sub-section has no application.

[Lawrence L.J. I should have thought that the provisions as to intestate succession ought to be treated as a will made by the Legislature (see per Lord Cairns in *Cooper* v. *Cooper* (2)), and be read into the testator's will.]

The effect of ss. 46 and 49 of the Act taken together is that the part of the property not effectively disposed of must go as if it was residuary estate under s. 46. It is true that all is made subject to the provisions contained in the will, but the result is that the appellant, besides being given a life interest by the will, is entitled to receive out of the property undisposed of 1000*l.* with interest from the testator's death and a life interest in the balance.

[Lawrence L.J. Is not the position this: that the wife takes a life interest under the will and then reading into the will the provisions made for her under the Act her estate receives on her death 1000*l.* with interest, but the life interest conferred by the Act, which only starts after her death, necessarily fails to take effect ?]

There is no reason for postponing the interest given to the wife under the Administration of Estates Act, 1925, to her life interest: see *Howe* v. *Lord Dartmouth.* (3) It is a trustee's duty to deal equitably between the beneficiaries, and for this purpose the wife must receive some immediate interest in the property undisposed of.

Sir Thomas Hughes K.C. and *Rand* for the respondents. There is undoubted difficulty in treating s. 33 of the Act of

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(1) (1883) 24 Ch. D. 643.

(2) (1874) L. R. 7 H. L. 53, 66.

(3) (1802) 7 Ves. 137, 148

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1925 as applying to a case of a contingent future intestacy, and the respondents do not contend that it does.

In a case like this, where the will is in part operative, the relevant provisions of s. 46 have to be read into the will and applied so far as is possible having regard to the provisions of the will. This follows from s. 49. The result of this is that the 1000*l.* is not payable till the appellant's death, and that as the life interest given to her by s. 46 only arises at her death it is valueless and disappears. The undisposed of beneficial interest is not an asset of the estate which the executor has power to realize. The executor's duty is to wait till the death of the widow and then to deal with the property in accordance with s. 46. There is no power to sell the undisposed of beneficial interest, which is not a reversionary interest in the true sense. It might be very detrimental to the other next of kin that it should be sold.

[Romer L.J. Why should not the widow get an immediate life interest in the property undisposed of ?]

That would mean going contrary to the whole terms of the will. Is it reasonable to suppose that the widow on a partial intestacy is to get more than on a total intestacy ? The true view is that s. 46 is to be read into the will, so that its provisions take effect subject to the life interest given to the wife. Besides there is no power to realize the undisposed of part of an estate where it is not wholly undisposed but only undisposed of after a life interest. The undisposed of reversion is not an asset of the estate to which the executor's power of sale applies.

As regards the cross-appeal, it is only desired to keep the argument open to contend that the appellant is not entitled to 1000*l.* with interest, but it is not sought to argue it here.

J. Neville Gray for the Public Trustee.

Cleveland-Stevens K.C. replied.

Cur. adv. vult.

May 11. Lord Hanworth M.R. The facts which give rise to this appeal can be very shortly stated. By his will dated July 8, 1912, the testator made certain bequests, and subject thereto he bequeathed all his real and personal estate not thereby otherwise disposed of to his trustee upon trust to (1.) call in and convert into money such part thereof as should not consist of money, (2.) pay his funeral and testamentary expenses and debts and legacies, (3.) invest the residue with the consent of his wife, (4.) pay the income thereof to his wife for her life, and (5.) after her death the corpus to be divided between his surviving brothers and sisters.

The testator died on August 6, 1928, leaving his wife and only one sister, Emily McKee, surviving him. This sister died on January 8, 1930.

The judge has held, and it is not questioned that he has rightly held, that the phrase "my surviving brothers and sisters" has reference to brothers and sisters living at the time for the division of the corpus, that is, upon the death of the widow who is still living. It is thus plain upon these facts that at her death the residuary estate of the testator is undisposed of by his will, and must be dealt with as upon an intestacy, and three questions are raised by the summons. [His Lordship stated the three questions asked by the unamended summons.]

I agree with the reasoning and conclusions stated by Maugham J., but I will add some further observations.

The intestacy as to the residue of the testator's estate brings into play Part IV. of the Administration of Estates Act, 1925, which consolidates and amends the series of enactments relating to the administration of the estates of deceased persons, repealing in whole, or in part, over forty statutes extending back to and including the Statute of Westminster the Second passed in 1285.

By s. 49, which is found in Part IV., it is provided: "Where any person dies leaving a will effectively disposing of part of his property, this part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications."

This section, therefore, applies to the present case and operates in substance—as pointed out by Lord Cairns in

Cooper v. *Cooper* (1) in relation to the Statute of Distributions —to make a will for the intestate in those respects in which he failed himself to do so; and the sub-clause and the part of it that is here effective is: "(*b*) The personal representative shall, subject to his rights and powers for the purpose of administration, be a trustee for the persons entitled under this part of this Act in respect of the part of the estate not expressly disposed of. . . ."

Turning then to s. 46, which is also in Part IV., the widow is entitled to take the personal chattels absolutely, and in addition the residuary estate is to stand charged with the payment of 1000*l.* to her with interest at 5 per cent. from the date of the intestate's death until it is paid or appropriated.

But does the trust imposed upon the personal representatives under sub-clause (*b*) above impose a duty of immediate sale of the reversion expectant upon the widow's life interest, in order to pay this 1000*l.* charged in the widow's favour, and to give her the benefit of the income from the balance produced by this sale? Sect. 49 in my judgment fills up the gap left in the will where it became ineffective as to a part of the property passing under it; and in respect of that part, inserts "this Part of the Act," i.e., Part IV., subject always to the provisions contained in the will. That is to say the section prescribes to the personal representative what his duties are with respect to the estate, subject always to the express provisions of the will, where applicable, superseding its terms. Then s. 46 lays down how the estate of an intestate is hereafter to be distributed "or be held on the trusts mentioned in this section." The section, curiously, seems to deal first with distribution, and later with holding in trust—whereas one would have expected that these two duties would have been placed in reverse order.

However it seems to contemplate that distribution may be postponed. Now in the present will there is a trust for sale and conversion, after which the further purposes expressed in the will are to be carried out, and the corpus of the residue is to be constituted.

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(1) L. R. 7 H. L. 53, 66.

I agree with Maugham J., that there is thus a valid trust for sale constituted by the will to the exclusion of such a trust under the Act, for the will overrides the Act; and it seems difficult to suppose that two separate trusts for sale are forced upon the personal representative. The statute does not appear to contemplate the erection of successive trusts for sale, nor is there any indication that a notional conversion is intended.

I agree also with the learned judge, that s. 33 does not intervene to effect such a result. That section is not in Part IV. of the Act, and by its sub-s. 7, when the deceased leaves a will it is to have effect " subject to the provisions of the will." More than that, it applies " on the death of a person intestate," and it does not appear to apply to the cases contemplated in s. 49, which deals with such a case as the present, where the will is effective in disposing of part of the estate and the section only deals with the other portion not so disposed of.

The above reasoning leads to the conclusion that there is not a trust for sale now operative as to the reversionary interest expectant upon the life of the widow. The result of this is that questions (*a*) and (*b*) must be answered in the negative.

I agree, as already stated, with the conclusion reached by Maugham J., as to the right of the widow's estate to receive the 1000*l.* under s. 46. With regard to question (*c*) the first part must also be answered in the negative, and the alternative in the latter part affirmed.

Lawrence L.J. In my judgment Maugham J. has come to the right conclusion in this case.

In the events which have happened the ultimate trust declared by the will of the testator concerning the residue of his estate in favour of his surviving brothers and sisters after the death of his widow has failed. That there would be such a failure first became evident on the death of the testator's surviving sister in the month of January, 1930. In the meantime the Public Trustee (the only executor and trustee) had under the effective provisions of the will administered the estate, and the net residue had become vested in and was held by him as a clear trust estate, the income of which has been and is now being paid to the widow as tenant for life. In these circumstances s. 33 of the Administration of Estates Act, 1925, which merely contains directions for the administration of the real or personal estate of an intestate, and is expressly made subject to the provisions contained in any will the deceased may leave (see sub-s. 7), has in my opinion no application. The effective provisions of the will of the testator provide for and cover all matters of administration dealt with in this section and supersede its provisions.

The question which now arises is what interest the widow takes in the undisposed of residue. It is contended on her behalf that she is entitled now to call upon the trustee (1.) to realize the whole of the reversionary beneficial interest in the testator's residuary estate expectant upon her death, (2.) to pay to her out of the proceeds of such realization the sum of 1000*l.* with interest thereon at 5 per cent. from the death of the testator, (3.) to invest the balance of such proceeds, and (4.) to pay to her the income of such investments during the remainder of her life.

In my judgment the fundamental error underlying this contention consists in treating the reversionary interest in question as if it were an item of the personal estate belonging to the testator at the date of his death, which fell to be converted into money by the trustee either under the trust for sale in the will or under the statutory trust for sale contained in s. 33 of the Administration of Estates Act, 1925, or under the rule in *Howe* v. *Lord Dartmouth.* (1) It is plain to my mind that it is nothing of the kind, but is a beneficial reversionary interest in the testator's residuary estate, which first came into existence on the testator's death by the joint operation of his will and the statute and vested in and now belongs to the persons in whose favour it was created; the trustee has no power of disposition over it. If I am right in this view it follows that when the period of distribution arrives on the death of the widow, she is not entitled to have the residue apportioned between herself and the remaindermen on the principle laid down in *In re Lord Chesterfield's Trusts.* (2)

(1) 7 Ves. 137.

(2) 24 Ch. D. 643.

Under the effective provisions of the will the only duty of the trustee during the life of the widow is to preserve the capital of the residuary estate intact and to pay the income arising therefrom to the widow during her life. On her death, but not until then, it will be the duty of the trustee to distribute the corpus of the residuary estate. Being undisposed of, the trustee will then have to distribute the estate in accordance with the provisions of s. 46 of the Act of 1925. In *Cooper* v. *Cooper* (1) Lord Cairns expressed the opinion that the Statute of Distributions ought to be looked at as in substance nothing more than a will made by the Legislature for the intestate. Applying that principle to the present case, the provisions of s. 46 of the Act of 1925, so far as applicable in the circumstances, should be read into the will of the testator after the determination of the life interest of the widow, as if they had been there inserted in place of the trust for his surviving brothers and sisters. The trustee can no more sell the reversionary interest taken by the persons entitled under s. 46 than he could have sold the reversionary interests of the testator's brothers and sisters had they been still alive.

The relevant portions of the Act of 1925 in the circumstances of the present case are ss. 49 and 46. Sect. 49 provides that where any person dies leaving a will effectually disposing of a part of his property Part IV. of the Act shall have effect as respects the part of his property not disposed of subject to the provisions contained in the will and subject to certain modifications which are immaterial in the present case. By s. 55, sub-s. 1 (xvii.), "property" is defined as including (inter alia) any interest in real or personal estate; consequently s. 49 applies to the reversionary beneficial interest in question here.

The result therefore is that Part IV. of the Act of 1925 is made applicable to the residue of the testator's estate after the death of his widow, as if it were "the residuary estate of an intestate," as defined in s. 33, sub-s. 4. The relevant provisions of Part IV. are to be found in s. 46. The present

(1) L. R. 7 H. L. 53, 66.

case is only concerned with the interest taken by the widow. Under s. 46, if the intestate leaves a widow she takes the personal chattels absolutely, and the residuary estate is charged with the payment of a sum of 1000*l.* with interest at 5 per cent. per annum from the death of the intestate, and subject thereto the residuary estate is to be held, if the intestate leaves no issue, upon trust for the widow for life.

As s. 49 provides that Part IV. of the Act is only to have effect subject to the provisions contained in the will, it follows that only those provisions of s. 46 which are not covered and superseded by the will are applicable to the present case. In the first place the direction in the section that the widow is to take the personal chattels is inapplicable here, as the will contains a specific bequest of these chattels to her, and the chattels have long since been delivered to her under that bequest. In the next place the direction in the section that the widow is to have a life interest in the residuary estate is inapplicable, because the will gives her such a life interest, and she has been and is in full enjoyment of such life interest under the trusts of the will. The widow cannot of course be entitled to a life interest after her own death, and to hold that she would become entitled to an apportioned part of the capital of the residuary estate distributable on her death under the rule in *In re Lord Chesterfield's Trusts* (1) would be tantamount to holding that in addition to the life interest taken by her in the whole of the residue under the will she was entitled under s. 46 to a life interest in the residue after her death, which in my opinion is not the true effect of the section when read in conjunction with the will.

That only leaves the question of the 1000*l.* and interest which is made a charge upon the residuary estate in favour of a surviving wife, and I agree with the learned judge that on the distribution of the capital of the residuary estate on the widow's death her personal representative will be entitled to payment of this sum and interest.

In my opinion the right way of executing the trusts of the residuary estate in the circumstances of the present case is to treat the residuary estate as if it had been bequeathed by the testator upon trust to pay the income to his widow for life and after her death upon trust to raise and pay to her representatives the sum of 1000*l.* with interest thereon at 5 per cent. per annum from the date of his death and subject thereto to stand possessed thereof in trust for his next of kin as ascertained in accordance with s. 46.

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(1) 24 Ch. D. 643.

For these reasons, which are substantially the same as those given by the learned judge, I agree that the appeal should be dismissed.

Romer L.J. In this case the testator, in the events that happened, has failed to make any disposition of the reversionary interest in the residuary estate expectant upon the death of his widow, to whom he gave a life interest in such estate. That reversionary interest is therefore a part of his property in respect of which, by virtue of s. 49 of the Administration of Estates Act, 1925, Part IV. of the Act is to have effect. For by s. 55, sub-s. 1 (vii.), of the Act the word "property" includes any interest in real or personal property, and the testator is a person who has died leaving a will effectually disposing of an interest in his real and personal estate—namely, an interest during the life of his widow—but has not disposed of the rest of his interest in that estate—namely, the reversionary interest expectant upon her death.

Now s. 46 of Part IV. of the Act is concerned with what is therein called the residuary estate of an intestate (which obviously means the fund and assets referred to in s. 33, sub-s. 4), and prescribes the method in which that residuary estate is to be distributed or the trusts upon which it is to be held. Sect. 49 of the Act must therefore be taken as enacting that the residuary interest undisposed of by the will of the testator shall, subject to the provisions contained in the will, and subject to the modifications specified in the section, which are not material for the present purpose, be held upon the same trusts as his residuary estate as defined by s. 33, sub-s. 4, would be held had he died altogether intestate.

The reversionary interest therefore stands charged with the payment to the widow of a net sum of 1000*l.* with interest, as mentioned in s. 46, sub-s. 1 (i.), and subject thereto is to be held upon trust for the widow for her life, and subject thereto upon the trusts specified in sub-s. 1 (v.).

Down to this point there is not, I think, any real disagreement between the parties represented before us. The disagreement between them arises with reference to the manner in which the trusts are to be performed. The widow contends that the reversionary interest should be sold for what it will fetch, and the net proceeds, after deducting her 1000*l.* and interest, invested, and the income upon the investments paid to her for her life. Alternatively she says that when, upon her death, the reversion falls into possession, the testator's residuary estate must be apportioned between her estate and those entitled after her in accordance with the principles of *Howe* v. *Lord Dartmouth* (1) and *In re Lord Chesterfield's Trusts.* (2) This contention is resisted by the remaindermen. They say that the reversionary interest must be held by the trustees unsold, and that, inasmuch as, when it falls into possession, the life interest of the widow will have necessarily come to an end, the whole residuary fund will then be distributable amongst them after provision for the widow's 1000*l.* and interest.

I do not for myself think that any light is thrown upon this question by the words of s. 49. The provisions of Part IV. of the Act are no doubt to have effect upon the reversionary interest "subject to the provisions of the will." But this can only mean that the provisions of the will are to remain unaffected, and whichever contention prevails this condition will be fulfilled. No one for instance contends or can contend that the trust for sale and investment contained in the testator's will, or the trust for the payment of the income to his widow for life, is in any way affected by the provisions of Part IV. of the Act. There is nothing inconsistent with the trust for conversion of the testator's residuary estate in retaining the reversionary interest unsold nor is there anything inconsistent

(1) 7 Ves. 137.

(2) 24 Ch. D. 643.

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with the trust for payment of the income of the residuary estate to the widow for life in selling the reversionary interest and paying the widow the income of the proceeds. To decide the matter in dispute between the parties we must therefore, in my opinion, look outside the section, and see whether there is any obligation imposed upon the trustees of the testator's will to sell the reversionary interest. If there is not, that interest must remain unsold, as contended for by the respondents.

Now, in connection with this matter, our attention was called to the provisions of s. 33 of the Act dealing with the case of a person dying intestate as to any real or personal estate. If that section applied to the present case, it would no doubt create much difficulty. In my opinion, however, the section is confined to the case of a person dying intestate as to some one or more specific items of his real or personal estate, and does not extend to a case like the present, where there is a will which deals with every item of the testator's estate, but omits to dispose of every interest in that estate. There is no provision in the Act that the words "real and personal estate" include any interest in real or personal estate. It is not therefore permissible to read s. 33 as referring to a person dying intestate as to any interest in his real or personal estate. Nor are the provisions of the section at all applicable to such a case. By way of illustration, let me take the case of a testator who has given the whole of his personal estate to his executors and trustees upon the usual trusts for conversion, payment of debts, funeral and testamentary expenses and legacies, and then to stand possessed of the residue upon trust for two persons in equal shares, of whom one predeceases the testator. If the one-half of the testator's net residue is to be treated as personal estate of his, as to which he has died intestate, then that half is to be held upon the trusts specified in sub-ss. 1 and 2 of s. 33 of the Act. But the sale of the testator's personal estate will already have been effected, in order to produce the very residuary estate of one-half of which the testator has failed effectually to dispose.

The section seems therefore quite inapplicable to such a case. Sect. 49 on the other hand appears to be expressly designed to meet it. The language is now changed. Instead of referring to "any real or personal estate" as to which a person may die intestate, the latter section refers to part of a testator's "property," a change which seems to be deliberate and attributable to the definition of property to which I have already referred. It is moreover to be observed that this construction of the two sections avoids the necessity of treating s. 49 as being almost entirely superfluous. For if s. 33 applies to such a case as I have mentioned, the one-half of the testator's residue must constitute the "residuary estate of the intestate" within the meaning of sub-s. 4 of the section, and it did not require s. 49 to make Part IV. of the Act applicable to it, or to provide that Part IV. should apply to it "subject to the provisions contained in the will." Part IV. would have applied to it even if s. 49 had not been in the Act, because it was residuary estate of the intestate; and it would have applied "subject to the provisions of the will" because of sub-s. 7 of s. 33.

For these reasons I cannot regard s. 33 as throwing any light upon the question of what has to be done with the reversionary interest of which the testator has failed to dispose. The trusts upon which it is to be held are, as I think, to be found in Part IV. of the Act, and nowhere else. This being so, I cannot find any ground for the widow's contention that the reversionary interest should be sold, or that any apportionment should be made as between income and capital when the interest falls into possession on the death of the widow. The case would appear to be the simple case of a specific reversionary interest directed to be held upon trusts for persons in succession and not the case of a residuary fund of which a reversionary interest happens to form part being directed to be held. In the former case the doctrine of *Howe* v. *Lord Dartmouth* (1) has no application, even if it could ever apply to a settlement affected by the Legislature. The subject-matter of the settlement effected by virtue of s. 49 of the Act is a reversionary interest, and it must remain a reversionary interest until it falls into possession. It is true that the widow will not in that case ever derive any benefit from her life interest in that subject-matter. But I cannot think that this is in any way contrary to the intentions of the Legislature. It would indeed be somewhat extraordinary if the Legislature had given to the widow any greater interest than she would have taken had the testator by his will declared trusts of his residuary estate to take effect after her death correponding to those specified in s. 46 of the Act. I cannot myself find any provision in the Act that the trusts specified in s. 46 are, in cases to which s. 49 applies, to be treated as declared in the will in relation to the interest undisposed of to take effect as and when such interest falls into possession. But I cannot doubt that to treat these trusts as being so declared in the will is to give effect to what the Legislature probably intended.

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(1) 7 Ves. 137*a*.

For these reasons I have come to the same conclusion as has been arrived at by Maugham J. and by the other members of this Court, and I agree that these appeals should be dismissed.

Appeals dismissed.

Solicitors: *Powell, Rogers & Merrick* for all parties.

H. C. G.

EVE J.
1931
April 15, 22.

In re SMITH'S MORTGAGE.

HARRISON *v.* EDWARDS.

[1930. S. 689.]

Mortgage—Sale by Mortgagee under Power—Bid for Property by Mortgagor—Specific Performance Action by Mortgagor Dismissed—Application of Proceeds of Sale—Costs, Charges and Expenses properly Incurred—Mortgagee not entitled to add Costs of Action to his Security—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 105.

The first mortgagees of property subject to a second mortgage put it up for sale by auction in exercise of their statutory power. The mortgagor attended the sale and bid for the property, but her bid was not accepted; and the highest genuine bidder was declared the purchaser. The mortgagor claiming that she had purchased the property, registered an estate contract in respect of it and sued the vendors for specific performance. The action was dismissed with costs. Upon a summons taken out by the first mortgagees against the second mortgagees:—

Held, that the costs of the action and of taking the estate contract off the register were not "costs, charges or expenses, properly incurred incident to the sale" within s. 105 of the Law of Property Act, 1925, and the first mortgagees were not entitled to deduct them from the net proceeds of the sale.

Parker v. Watkins (1859) Johns. 133 followed.

ORIGINATING SUMMONS.

By a legal charge dated January 16, 1929, between Mrs. A. T. Smith (the mortgagor) and the now plaintiffs S. H. Harrison and L. C. Nicoll (the mortgagees), Pademore Farm, Eastoft, Lincolnshire, was mortgaged to secure 800*l.* and interest at 6 per cent. The property was further mortgaged by a second charge dated April 9, 1929, made between the mortgagor and E. E. and C. E. Edwards to secure 200*l.* and interest. The second charge was registered as a puisne mortgage.

The mortgage debt having been called in, the plaintiffs exercised their power of sale, and the property was put up for sale by auction on December 10, 1929, and purchased by R. E. Taylor for 1130*l.* The mortgagor attended the sale and claimed to be the highest bidder, and afterwards registered an estate contract against the property. The auctioneer refused to accept her bid. The mortgagor brought an action against the first mortgagees for specific performance of the alleged contract, but the action was dismissed with costs. The mortgagor was also ordered to pay the costs of a motion to take the estate contract off the register. She had no assets out of which to pay these costs, which amounted to 275*l.*

The plaintiffs issued this summons asking whether they were entitled to retain these costs out of the net proceeds of sale in their hands, or whether, after deduction of principal, interest and costs (other than the costs of the said action and motion), they ought to stand possessed of the balance of the net proceeds of sale upon trust for the defendants, the second mortgagees.

F. C. Watmough for the plaintiffs. The mortgagees are entitled to the costs of all proceedings incurred in defending their title against any attack. The mortgagor said she had bought the property, having bid 5*l.* more than the actual purchaser, but her bid was not accepted. These costs arose strictly out of the exercise by the mortgagees of their power of sale: Law of Property Act, 1925, s. 105; Wolstenholme & Cherry's Conveyancing Statutes, vol. i., p. 315; Seton on Decrees, vol. ii., p. 1881; *National Provincial Bank of England* v. *Games.* (1)

L. M. Jopling for the defendants. The mortgagees are not entitled to deduct these costs from the proceeds of sale. It is a mere accident that the plaintiff in the specific performance action happened to be the mortgagor; it might well have been a stranger. The costs do not relate to any security of the mortgagee. The second mortgagees should not be prejudiced because the plaintiff in the specific performance action was unable to pay her costs. The action was one personal to the first mortgagees, not as mortgagees, but as vendors of property. The same applies to the costs of vacating the estate contract which the mortgagor registered. The case is covered by the decisions in *Parker* v. *Watkins* (2)

(1) (1886) 31 Ch. D. 582.

(2) Johns. 133.

and *Owen* v. *Crouch* (1), where costs incurred by the mortgagees in defending vexatious actions were not allowed to be added to the security.

Cur. adv. vult.

April 22. EVE J. The question for determination is whether the plaintiffs are entitled to retain out of moneys in their hands representing proceeds of sale of property sold by them by auction as mortgagees under their statutory power of sale all or any part of the costs of an action brought by the mortgagor claiming specific performance of an alleged contract effected by a bid made by her at the auction and of a motion by the plaintiffs for vacation of a land charge effected by the registration by the mortgagor of an estate contract in respect of the said bid.

The mortgage was created by a legal charge dated January 16, 1929, made between Mrs. Amelia Thompson Smith, of the one part, and the plaintiffs of the other part, whereby certain lands and premises at Eastoft in the county of Lincoln were conveyed to the plaintiffs to secure an advance of 800*l.* and interest at 6 per cent. per annum. The defendants are puisne mortgagees of the same property by virtue of a charge dated April 9, 1929. The mortgagor made default in the payment of interest and the plaintiffs in exercise of their power of sale put the property up for sale by auction on December 10, 1929, when it was sold to one Taylor for 1130*l.* The mortgagor, who was present at the sale, alleged that she and not Taylor was the highest bidder, and that by her bid she accepted the vendors' offer to allow the highest bidder to be the purchaser so as to constitute a binding agreement between her and the vendors, and she thereupon registered a land charge under the Lands Charges Act, 1925, in respect of the estate contract created by her alleged bid. The plaintiffs on January 3, 1930, moved for an order to vacate this registration, but on the respondent intimating her intention of issuing a writ for specific performance of the alleged contract no order was made on the motion except that the costs thereof were to be dealt with in the action.

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(1) (1857) 5 W. R. 545.

The action, which was in substance one for specific performance, was duly brought, the mortgagees and the purchaser being defendants, and on October 30, 1930, it was dismissed with costs, the plaintiff in the action being also ordered to pay the costs of the motion. She has made no payment on account of the costs which were taxed at 275*l.* 15*s.* 2*d.*, and if the plaintiffs are right in their claim to retain these costs out of the proceeds of sale there will remain little or nothing for the defendants. In these circumstances the defendants contest the plaintiffs' claim; they do not dispute that a mortgagee is entitled to retain costs of litigation properly and reasonably incurred, but they argue that this right is limited to costs of litigation incurred for the benefit of all parties interested, that is to say, in asserting or protecting the title to the estate, and does not extend to costs incurred by the mortgagee in defending his own security, still less to those involved in resisting the claim of a person whose cause of action is an alleged dereliction of duty on the part of the mortgagee.

In support of this contention they rely on the cases of *Parker* v. *Watkins* (1) and *Owen* v. *Crouch*. (2) The following is a short statement of the material facts of the former of these two cases. In a settlement made in 1824 whereby five freehold houses at Oxford were settled upon one Anne Eaton and her husband for their lives and the life of the survivor with remainder to all their children in fee, there was contained a power to the settlors to direct the trustees to raise the sum of 1500*l.* and to pay the same as they, the settlors, should appoint and a power to the trustees to raise the said sum by mortgage of the settled property except one house. In 1842 Mrs. Eaton and her husband assigned her life interest to the defendant Watkins by way of mortgage for securing 1200*l.* and interest. In 1845 the settlors appointed the whole sum of 1500*l.* and directed the same to be paid to four persons who were trustees of another settlement. The 1500*l.*, together with 60*l.*, the estimated costs incurred in raising the same, was borrowed from the plaintiff Parker and secured by

(1) Johns. 133.

(2) 5 W. R. 545.

mortgage of the settled property except the one house. In 1852 Anne Eaton, then a widow, brought an action against the surviving trustee of the settlement and his solicitors, Parker & Watkins, wherein she claimed, amongst other things, a declaration that Parker's mortgage was a security for 1500*l.* only, alleging that the 60*l.* for costs ought to have been provided out of the appointed fund. The action was dismissed with costs as against Parker and an appeal from this part of the decree met with the same result. Parker's costs of the suit and appeal were taxed at 195*l.* and upwards, but no part of this sum was paid by Mrs. Eaton and in the action, to the report of which I am referring and which was an action for foreclosure, Parker claimed to be paid this 195*l.* by the defendants or some of them. The Vice-Chancellor expressed himself as having no doubt that the 60*l.* was properly raised, but he dismissed Parker's claim to be paid the costs of Mrs. Eaton's action by Watkins and the reversioners, and gave his reason in these words: "I quite agree, that, where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all parties, he is entitled to charge those expenses against the estate; but if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption unless they can be shown to have concurred in or assisted the litigation. It is the ordinary case of anyone who has the misfortune to have dealings with a litigious person, who is unable to pay the costs occasioned by his conduct." In *Owen* v. *Crouch* (1) the contrast between the two kinds of litigation was still more marked. There the mortgagee upon entering into possession of the mortgaged premises found them in the occupation of two Irish families who had been planted therein by the next door neighbour, one Millikin, whom the Vice-Chancellor described as a man of violent and unscrupulous character. The mortgagee turned the intruders out but later on was himself forcibly evicted by Millikin, who was accompanied by some twenty other

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(1) 5 W. R. 545, 546.

Irishmen. On the advice of counsel the mortgagee brought an action for ejectment in which he obtained a verdict; he also defended an action of trespass brought by Millikin, who was non-suited. Upon a summons to determine whether the mortgagee should be allowed the costs of prosecuting the action of ejectment and defending the action of trespass, Wood V.-C., after holding that the costs of the ejectment action must be allowed, proceeded as follows: "As to the costs of defending the action of trespass, the case was very different. This violent neighbour chose to bring an action of trespass against the mortgagee with as much reason as he might against anyone then in Court. Was the Court to fasten upon the mortgagor the consequences of this action? It was contended that if the mortgagor had paid the defendant at the proper time, there would have been no action; but this applied equally to the assault, or any other possible collateral damage arising from this inconvenient neighbour, which could not be fastened upon the mortgagor, who was only liable for any charges incurred in a just protection of the property. These costs did not come within that category, and they could not be allowed to the mortgagee." These cases show clearly that costs of litigation concerning the mortgaged property arising out of the wrongful act of a third person will not be allowed to the mortgagee unless they were incurred in protecting the title to the estate.

All the costs involved in the present application were incurred in resisting an unfounded claim by the mortgagor that the mortgagee had entered into a contract to sell the property to her. The dispute did not at any point touch the title to the estate, but was confined to an attack upon the mortgagee, and the fact that the mortgagor happened to be the attacking party was in the circumstances a mere accident and of no materiality. It was not in that capacity she sued, but as the alleged highest bidder at the auction. I must therefore answer the first question in the negative, the second in the affirmative, and order the applicants to pay the respondent's costs.

Solicitors: *E. C. Kilsby & Son; E. Edwards & Son.*

H. L. L.

FARWELL J.

1931
March 30, 31.

In re COLE, A. V. AND M. E. M.

TRUSTEE IN BANKRUPTCY *v.* PUBLIC TRUSTEE.

[588 of 1930.]

Bankruptcy—Post-nuptial Settlement—Purchaser for valuable Consideration—Bona fide Compromise of bona fide Action — Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42.

A bona fide compromise of a bona fide action claiming rights against a defendant's property is valuable consideration within the meaning of s. 42 of the Bankruptcy Act, 1914, for a settlement of that property made by the defendant under that compromise, and the plaintiff is the purchaser within that section.

It is not the business of the Court of Bankruptcy before which the settlement is subsequently impeached to consider whether the action could possibly have succeeded if fought out to a finish.

Motion.

The bankrupts were married at the British Consulate, Lyons, on January 26, 1928. The wife was then an infant, and her father had refused his consent to the marriage. But both spouses made a false declaration under the Foreign Marriages Order in Council, 1913, Sch. II., to the effect that there was not any lawful hindrance to the marriage and that neither spouse was under twenty-one.

The wife was entitled contingently on attaining twenty-one to about 8000*l.* personal estate.

On April 16, 1928, the Attorney-General, at the relation of the wife's father, issued a writ against the spouses [1928. A. 773] claiming a declaration under the Marriage Act, 1823 (4 Geo. 4, c. 76), s. 23, and the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 14, that the husband had forfeited all right to any property accrued or accruing to him by the marriage and for an order for a settlement of that property on the wife and/or her issue, so as to exclude the husband.

The statement of claim, dated May 3, 1928, alleged that the marriage was procured by the false declaration of each defendant.

In their defence, dated May 30, 1928, the defendants admitted the marriage, but not the false statements. They

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stated that they were always willing to concur in a proper settlement of the wife's property, and the husband did not and never had desired any interest therein.

On July 22, 1928, the wife attained twenty-one, and her title to the 8000*l.* became absolute.

The action was subsequently compromised, and by an order of November 5, 1928, all further proceedings were stayed on the terms in the Schedule. These terms were that the Public Trustee should be the trustee of the settlement and the wife's property should be transferred to him on trust for the wife for life without power of anticipation and subject thereto for her issue by any marriage as she should by will appoint and subject thereto for her children by any marriage at twenty-one or (in the case of females) marriage, with an ultimate trust in default of such children for the persons who would be entitled under the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), if the wife had died absolutely possessed thereof intestate and without having been married. The settlement was to contain a power to purchase a freehold or leasehold house, an after-acquired property clause, and the husband was to pay the costs of the settlement and the taxed costs of the action.

On April 24, 1929, a settlement on these terms was executed between the wife, the Public Trustee, the father and other parties, not including the husband.

On June 12, 1930, the husband and wife, who were carrying on business in partnership, failed to comply with a bankruptcy notice. On October 17, 1930, a receiving order was made against them on that act of bankruptcy, and on January 13, 1931, they were adjudged bankrupt.

On March 5, 1931, the trustee in bankruptcy issued a notice of motion against the Public Trustee for a declaration that the settlement was void against the applicant under the Bankruptcy Act, 1914, s. 42, and for an order for transfer of the property. At the hearing, however, it was admitted that the settlement was only voidable to the extent necessary for paying the wife's debts, and the declaration and order must be limited accordingly.

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W. N. Stable and *Melford Stevenson* for the trustee in bankruptcy. Sect. 23 of the Marriage Act, 1823, provides that if any valid marriage shall be procured by a party to such marriage to be solemnized between persons, one or both under twenty-one, by means of such party, wilfully and knowingly, falsely swearing as to any matter required to be sworn, and knowing that the person under twenty-one had a parent then living who had not consented to the marriage, it shall be lawful for the Attorney-General by information at the relation of the parent to sue for a forfeiture, of all interest "in any property which hath accrued or shall accrue to the party so offending by force of such marriage." The Court shall have power to declare the forfeiture, and thereupon to order that all interest in any property "as shall then have accrued or shall thereafter accrue to such offending party by force of such marriage" shall be secured for the benefit of "the innocent party," or of the issue of the marriage, in such manner as the Court thinks fit for the purpose of preventing "the offending party" from deriving any interest or pecuniary benefits from such marriage. And if both the parties are guilty of the offence it shall be lawful for the Court to settle and secure the property or any part thereof immediately for the benefit of the issue of the marriage, subject to such provision for "the offending parties," by way of maintenance or otherwise, as the Court in the particular circumstances shall think reasonable, regard being had to the benefit of the issue during their parents' lives, and of the issue of the parties respectively by any future marriage, or of the parties themselves in case either of them shall survive the other.

The Foreign Marriage Act, 1892, s. 14, provides that if a marriage is solemnized under this Act by means of any wilfully false notice signed or oath made by either party to the marriage as to any matter for which a notice or oath is by this Act required, the Attorney-General may sue for the forfeiture of all interest in any property in England "accruing to the offending party by the marriage," and the proceedings and consequences shall be the same as provided by law in the like case with regard to marriages solemnized in England according to the rites of the Church of England.

The Bankruptcy Act, 1914, s. 42, provides that any settlement of property not being a settlement "made before and in consideration of marriage" or "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration," or, etc., shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy.

Now here the 8000*l.* was the wife's own property. It did not accrue to her on marriage, and the Attorney-General could not touch it under the Marriage Act, 1823, or the Foreign Marriage Act, 1892. Again nothing accrued to the husband on the marriage except a possible spes successionis in the event of his wife's intestacy. That is surely not within the meaning of those Acts.

The Attorney-General's action was therefore absolutely misconceived and must have failed. In these circumstances the settlement was a purely voluntary settlement of the wife's own property and directly within s. 42.

The exception of a settlement "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration" has been the subject of numerous decisions, but their general effect is, that though the consideration need not be pecuniary, there must be a quid pro quo: see *Ex parte Hillman* (1); *Hance* v. *Harding* (2); *In re Parry* (3); *In re Pope* (4); *In re Collins* (5); *In re Macdonald* (6); *In re Charters.* (7)

The compromise of a bona fide claim is of course good consideration: *Callisher* v. *Bischoffsheim* (8), but the Court can look into all the circumstances: *Ex parte Banner* (9); *Miles* v. *New Zealand Alford Estate Co.* (10), and if the action is on the face of it so impossible of success that it would be

(1) (1879) 10 Ch. D. 622.

(2) (1888) 20 Q. B. D. 732.

(3) [1904] 1 K. B. 129.

(4) [1908] 2 K. B. 169.

(5) (1914) 112 L. T. 87; L. R. Digest, 1911–20, 369.

(6) [1920] 1 K. B. 205.

(7) [1923] B. & C. R. 94; L. R. Digest (1923) 27.

(8) (1870) L. R. 5 Q. B. 449.

(9) (1881) 17 Ch. D. 480.

(10) (1886) 32 Ch. D. 266, 291, 292.

struck out in limine as frivolous and vexatious, the compromise cannot surely be good consideration. In any case there is no purchaser here.

Grant K.C. and *R. H. Hodge* for the Public Trustee. The action was obviously bona fide between the parties and might possibly have succeeded in Court. But the Court is not concerned with the probability of success. It was certainly not frivolous and vexatious on the face of it, and the compromise was good consideration for the settlement. The Attorney-General, representing the unborn children, gave up his possible right to exclude the wife as an offending party, and the wife gave up her possibly defeasible absolute interest in return for an assured life interest. This was ample mutual consideration, and the unborn children were the purchasers through the Attorney-General.

Stable replied.

FARWELL J. [after stating the facts :] This post-nuptial settlement being made within two years of the wife's bankruptcy is void against the trustee in bankruptcy so far as necessary to pay her debts, unless it is protected as a settlement "made in favour of a purchaser . . . . in good faith and for valuable consideration." Is this settlement within that exception ?

The authorities establish that when once the Court is satisfied that there has been a compromise of legal proceedings brought in good faith, that compromise, at any rate for the purpose of supporting a contract, represents good consideration, and it is not for the Court to determine whether or not the action could or would have succeeded if prosecuted to the end.

The trustee in bankruptcy says that the action could not possibly have succeeded, because the 8000*l.* was the wife's own property not accruing to her on the marriage, and the Acts of 1823 and 1892 under which the action was brought had no application. Whether that would have been a good answer is a matter I am not concerned with, and I express no view about it. It is admitted on both sides that the action was brought in good faith, and indeed as the Attorney-General was the plaintiff the admission is almost a matter of course.

Now the action if successful might have resulted not only in excluding the husband from any benefit in his wife's property, but also in excluding the wife as well and settling the property entirely on her issue. The compromise, sanctioned by the Court, was therefore valuable consideration for the settlement.

The trustee in bankruptcy then contends that there was no purchaser for valuable consideration. The authorities, however, show that the consideration need not be pecuniary, and although there must be a quid pro quo it need not necessarily be for the benefit of the plaintiff personally.

Now here the Attorney-General, representing the unborn issue of the marriage, was giving up the right he claimed rightly or wrongly, to have the wife's property settled solely on the issue. It is true he claimed a settlement on the wife and/or her issue. But if the action had succeeded the Court might have excluded the wife altogether, or given her only a very limited interest, such as a protected life interest. On behalf of the unborn issue the Attorney-General gave up this claim.

On the other hand if the action had failed the wife would have remained owner of her own property. The husband would possibly not only have escaped liability for costs, but would have remained entitled to a spes successionis on his wife's intestacy. They were therefore each giving up something substantial by the compromise. The husband was giving up any claim to the property and agreeing to pay the costs of the action. The wife was giving up her absolute property in exchange for a life interest, and nothing more, not even a general power of appointment in default of issue.

In these circumstances the settlement was made for valuable consideration, the purchasers being the unborn issue represented by the Attorney-General. It was made in their favour and for their benefit, and " bought " by them by giving up their possible right to exclude the wife.

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The matter is one of considerable difficulty and not covered by any exact authority, but looking at the existing authorities and putting the best construction I can upon s. 42, I have come to the conclusion that the motion fails and must be dismissed with costs.

Solicitors: *Ramsden & Co.; Child & Prescott.*

G. R. A.

EVE J.
1931
April 15.

In re EGTON SETTLED ESTATE.

FOSTER *v.* FOSTER.

[1931. F. 17.]

Settled Land—Settlement of undivided Moiety of Estate—Will creating Settlement of remaining Moiety—Death of Testator before 1926*—Death of Tenant for Life after* 1926*—Vesting, whether in Special Executors or Public Trustee—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 1, 2, 117 (1.) (*ix.*)*—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 39, *Sch. I., Part IV.*

By a voluntary settlement made in 1909 an undivided moiety of a freehold estate was settled upon the usual limitations of a strict settlement, and the settlor having acquired the other moiety afterwards settled it by his will upon the same uses and trusts and with the same trustees as the settlement. The settlor died in 1910 and the tenant for life under the two settlements died in 1930:—

Held, that the entirety of the land was settled land, the two moieties having completely merged before 1926, and that on the death of the tenant for life it vested in his special executors.

By a settlement dated June 22, 1909, and made between John Foster of the one part and Fanny Elizabeth Foster, John Kenneth Foster, Robert Lionel Foster, Charles Percival Foster and Francis Edward Foster of the other part, one equal undivided moiety of and in a mansion house, a manor or lordship and certain lands and hereditaments at Egton and Glaisdale, Yorkshire (all known as the Egton estate), was settled by the said John Foster to the use of J. K. Foster during his life with remainder to the first and other sons of J. K. Foster according to seniority in tail male with remainder to the use of R. L. Foster during his life with divers remainders over, and the parties thereto of the second part were thereby appointed trustees for all the purposes of the Settled Land Acts, 1882 to 1890.

By his will dated September 9, 1909, the said John Foster appointed the trustees of the said settlement to be executors and trustees thereof, and after making various specific and pecuniary bequests and specific devises, devised all that his undivided moiety in the Egton estate to the uses upon the trusts and subject to the powers of the said settlement of 1909 or such of the same as might be subsisting at the time of the death of the testator, and he thereby appointed the trustees for the time being of the said settlement to be trustees of all the hereditaments thereby devised for the purposes of the Settled Land Acts.

John Foster died on February 8, 1910, and his will, together with a codicil, which did not affect the above dispositions, was duly proved in the Principal Probate Registry on April 5, 1910, by J. K. Foster and R. L. Foster, power being reserved to the other executors named to prove.

J. K. Foster died without leaving any male issue on March 2, 1930, having by his will dated June 14, 1929, appointed the defendants Mary Foster, Robert Lionel Foster and Geoffrey Ernest Tritton, executors thereof, who on July 19, 1930, duly proved the same, "save and except settled land," in the Principal Probate Registry.

On October 17, 1930, administration of the estate of J. K. Foster was granted by the Principal Probate Registry to the defendants Robert Lionel Foster and Alwyn Foster and the plaintiffs Charles Percival Foster and Francis Edward Foster the surviving trustees of settled land vested in John Kenneth Foster at the date of his death, and therefore special executors as to such settled land within the Settled Land Act, 1925.

At the date of the death of John Kenneth Foster the surviving trustees of the Settlement of 1909 were the defendant R. L. Foster and the plaintiffs C. P. Foster and F. E. Foster.

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The plaintiffs issued this summons to have it determined whether the entirety of the Egton estate, undivided moieties of which were respectively settled by the settlement of 1909 and the will of the settlor, became at the commencement of the Law of Property Act, 1925, and still remained vested in the Public Trustee or any other and if so what person upon the statutory trusts under the provisions of s. 39 and Part IV. of the First Schedule to the Act, or whether the same remained and was still settled land, and in the latter event to determine in what persons the land was vested.

Swords K.C. and *A. J. Belsham* for the trustees of the settlement of 1909. The two settlements are of different properties and subsist side by side. There has been no merger: see Settled Land Act, 1925, s. 91. "Land" for the purposes of all the Law of Property Acts does not include an undivided share in land. The case falls under Part IV. of Sch. I. of the Law of Property Act, 1925, and the property is vested in the Public Trustee under para. (4.). A compound settlement does not involve merger: *In re Coull's Settled Estates* (1); *In re Mundy's Settled Estates.* (2)

Spens K.C. and *J. F. Bowyer* for the defendant R. L. Foster, the tenant for life. Under the original settlement of 1909 J. K. Foster became tenant for life of one undivided moiety, and on the death of J. Foster of the other moiety also. There was a complete merger, and he became tenant for life of the entirety. It is not as if there were two settlements of two separate estates upon the same limitations. That case is dealt with in s. 91 of the Settled Land Act, 1925. There is no question that before the Act of 1925 J. K. Foster could have sold as tenant for life of the entirety. The legal estate in the entirety vested in J. K. Foster, and on his death he is to be deemed to have appointed the trustees of the settlement "special executors" of the property. Under s. 1 of the Settled Land Act a settlement may consist of or be contained in two or more instruments.

David L. Jenkins for the remainderman.

(1) [1905] 1 Ch. 712.

(2) [1891] 1 Ch. 399.

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Eve J. In my opinion this must be treated as settled land. It is true that the two moieties were settled by separate instruments, the one by the deed of June 22, 1909, and the other by the will of September 9, 1909, but the limitations of the two moieties are identical, and at the relevant date the entirety was in the possession of the same individual as tenant for life. In these circumstances it is impossible to hold that prior to January 1, 1926, the land was held in undivided moieties. It was then and still remains settled land and is vested in the special executors.

Solicitors: *G. F. Hudson, Matthews & Co.*

H. L. L.

SPYER *v.* PHILLIPSON.

C. A.
1930
LUXMOORE J.
July 24, 25; *Oct.* 22, 23.
C. A.
1931
Jan. 26, 27.

[1929. S. 767.]

Landlord and Tenant—Flat—Ornamental Panelling—Decoration of Rooms—Object and Purpose of Decorations—Method of Annexation—Landlord's or Tenant's Fixtures—Right of Removal by Tenant.

The lessee of a flat, which he held for a term of twenty-one years, without the consent of the lessor installed in some of the rooms certain valuable antique panelling, ornamental chimney pieces and so-called "period" fireplaces. No portion of the structure of these rooms was altered in order to fix the panelling, but it was placed in position by inserting into the walls wooden plugs to which it was attached by screws. Some slight structural alteration was effected in fixing the new chimney-pieces and fireplaces. The lessee having died during the currency of the term, his executors claimed the right to remove the panelling, chimney pieces and fireplaces, alleging that these installations were tenant's fixtures, and as such removable by them. The lessor, on the other hand, contended that the panelling and chimney pieces had been fixed and installed in such a way as to become part of the structure of the demised premises; that their removal would cause damage to the structure; that the installations by the lessee constituted landlord's fixtures, and that his executors were not entitled to remove them. In an action by the lessor to restrain the executors from removing the fixtures:—

Held (affirming the decision of Luxmoore J.), that in determining whether a particular chattel was a tenant's or a landlord's fixture the Court had to consider what were the object and purpose of the annexation, and what would happen if the annexed chattel were removed. So long as the chattel could be removed without doing irreparable

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damage to the demised premises, neither the method of attachment nor the degree of annexation, nor the quantum of damage that would be done either to the chattel itself or to the demised premises by the removal, had any bearing on the right of the tenant to remove it, except in so far as it threw a light upon the question of the intention with which the tenant affixed the chattel to the demised premises.

Held, also, upon the facts, that the Court could not infer an intention on the part of the tenant that the fixtures in question should become part of the demised premises, but that the proper inference to be drawn was that the tenant intended himself to enjoy them and not to benefit the demised premises.

Held, therefore, that the fixtures were tenant's fixtures, and that the executors were entitled to remove them.

Leigh v. *Taylor* [1902] A. C. 157 followed.

Action.

The plaintiff was by virtue of a deed of transfer dated June 29, 1928, and made between the personal representatives of one George Paxton deceased as vendors and himself as purchaser the assignee and entitled to the benefit of the headlease of certain premises, Nos. 70 and 74 Portland Place in the County of London granted by Lord Howard de Walden to the said George Paxton by an indenture dated April 30, 1912, for a term of ninety-nine years from October 11, 1910. As assignee of the headlease he was also entitled to the reversion expectant upon the determination of a lease dated July 5, 1912, of a flat in the above mentioned premises, this lease being made between the said George Paxton as landlord of the one part and one Ralph Hilton Phillipson since deceased as tenant of the other part.

The defendants were the executors of the said Ralph Hilton Phillipson.

The question in dispute was as to the right of the defendants, as executors, to remove out of the flat demised by the above mentioned lease of July 5, 1912, certain valuable antique oak and pine panelling, chimney pieces and fireplaces, which had been installed in some of the rooms in the flat by the said Ralph H. Phillipson, and which were claimed by the plaintiff as landlord's fixtures and therefore his property and not removable by the defendants.

By the lease in question of July 5, 1912 (hereinafter called "the lease"), George Paxton (therein called "the landlord") demised to Ralph Hilton Phillipson (therein called "the tenant") a flat in the premises, 74 Portland Place, by the description of "All that suite of rooms being Flat C upon the third floor and the valet's room boxroom coal cellar and wine cellar to be used in connection with such flat in the basement of a mansion erection and buildings called 74 Portland Place in the County of London (hereinafter referred to as 'the said mansion') with the fixtures and things in and upon the same including those mentioned in the list annexed hereto. . . . ." The lease was for a term of twenty-one years from June 24, 1912, at a rent of 900*l.* per annum, with certain additional rent payable as therein mentioned. There was a schedule to the lease which set out the list of fixtures above referred to. It included sixteen chimney pieces and stoves and various other things, each of them the property of the landlord. Among the covenants entered into by the tenant was one in the following terms: "3. That the tenant will at the tenant's own expense throughout the said term well and substantially maintain and keep the interior of the demised premises and also the doors windows skylights stoves hot water system bath water-closets cisterns pipes taps drains locks keys bolts bars and all other fixtures and fittings therein belonging to the landlord in good substantial efficient sanitary and tenantable decorative order and repair and in thoroughly clean condition (except in case of destruction or damage by fire) . . . . and in case . . . . any of the said fixtures fittings or appliances shall be missing broken damaged or destroyed will forthwith reinstate or replace them with others of a similar character and of equal value and will replace all missing keys and the demised premises so repaired maintained painted enamelled papered grained varnished whitewashed coloured tinted gilded decorated swept cleansed and kept as aforesaid at the expiration or sooner determination of the said term will (subject to any proviso hereinbefore contained) peaceably and quietly leave surrender and yield up unto the landlord together with all fittings belonging to the landlord including those mentioned in the list annexed hereto and all fixtures (usually denominated landlord's fixtures) which at any time during the continuance of the said term shall be erected on or used or fastened to the demised premises and all improvements and additions thereto." The tenant further covenanted by clause 7 (*l*) that he would not during the term of the lease "without the licence in writing of the landlord cut or maim any of the walls partitions timbers girders ceilings or other structures of the demised premises or any part thereof or in any way alter the plan height elevation or arrangement of the demised premises nor erect any additional building thereon."

It appeared that at the time when the negotiations for the lease to Mr. R. H. Phillipson were in progress there was no communication between the rooms in the flat in which the panelling was subsequently placed. The rooms were originally five in number, but about the time of the granting of the lease, doors were opened between three of the rooms. These were shown on a plan produced and marked A, B and C. In 1922, with the consent of the landlord, and on an undertaking being given by the tenant that the partition would be reinstated, the fourth and fifth rooms were thrown into one to form one large room, marked D on the plan. This also had a door communicating with room C. It did not appear from the evidence that the tenant had ever asked or had any consent ever been given for anything in the nature of panelling to be put in in any of the rooms or that the decoration of the rooms should be altered in any way.

In November or December, 1920, the tenant, under the supervision of a well known expert, caused to be placed and erected in rooms A, B and C, some valuable oak panelling of the Stuart period, dated about 1620, which he had purchased for 2000 guineas. Shortly after he had thrown the two rooms mentioned above into one, room D, he also erected and placed therein some valuable pitch pine panelling, dated about 1720, of the early eighteenth century, and which was also of a very ornamental nature. It appeared from the evidence that the total value of the whole of the panelling put in in rooms A, B, C and D was about 5000*l*. At about the same time as the panelling was put into these rooms, new chimney pieces and "period" fireplaces were also erected in two of them. In carrying out the entire scheme of decoration it appeared that the tenant removed the original architraves, skirting boards and window linings in all the rooms and the cornice in one of the rooms.

At an early stage in the proceedings considerable discussion took place as to the method in which the particular pieces of panelling and chimney pieces were put in and attached, and it was therefore, by an agreement dated July 30, 1930, between all parties, agreed that a Mr. J. G. Head, a well known expert surveyor, should be asked to make a survey of the rooms and report to the Court as to the manner in which the panelling was put in, as to the alterations carried out, and what had been done with regard to the ceilings, chimney pieces and other portions of the premises. The proceedings consequently were ordered to stand over pending the completion of the report.

The material portions of the report of Mr. Head, dated October 9, 1930, are set out in the judgment of Luxmoore J., but shortly stated it appeared that no portion of the structure of three rooms was altered in order to fix the panelling and ceilings, but the panelling was placed in position by inserting into the wall wooden plugs, to which it was attached by screws. In these three rooms a frieze, consisting of a light wooden frame upon which canvas was stretched, giving a solid appearance, was put above the panelling and a false ceiling above the panelling in two of the three rooms. The frieze was not itself fixed to any member either of the panelling, cornice or wall. No frieze or false ceiling was inserted in a fourth room. There was evidence that some slight structural alteration had been effected in fixing the new chimney pieces and "period" fireplaces. Expert witnesses said that the method stated to be employed was the ordinary way of affixing panelling to rooms already built, whether it was to be fixed permanently or for a temporary purpose.

The plaintiff alleged as above stated that the chimney pieces and panellings had been fixed and installed by the tenant in such a manner as to become a part of the structure of the demised premises, and their removal would cause damage and injury to the structure. He claimed therefore that these installations constituted landlord's fixtures and were an improvement or addition to the premises demised by virtue of the covenant contained in clause 3 of the lease of July 5, 1912, and that the defendants were not only not entitled to remove the same or any part thereof, but were bound to leave, surrender and yield up intact unto the plaintiff the chimney pieces, fireplaces and panelling with the demised premises upon the expiration or sooner determination of the term. He consequently asked for a declaration that these installations by the tenant constituted landlord's fixtures, and as such belonged to the plaintiff and were not removable by the defendants, and he sought an injunction to restrain their removal accordingly.

The defendants admitted that in December, 1928, they were desirous of surrendering the lease and had then claimed the right to remove the panelling and frieze, also that the tenant had during the term made considerable alterations in the decoration of the four rooms in the flat A, B, C and D. They however denied that the panelling and frieze were permanently fixed so as to become part of the structure or that their removal would cause damage or injury to the premises or the structure, and they further denied that the panelling or frieze was in the nature of landlord's fixtures.

N. L. C. Macaskie K.C. and *G. P. Slade* for the plaintiffs. The panelling put in by the tenant Mr. Phillipson is in the nature of landlord's fixtures and not removable by the defendants.

Whatever is affixed to the freehold during a lease becomes part of the structure, and though this rule has been somewhat relaxed latterly, the principle remains: *Buckland* v. *Butterfield* (1); *Holland* v. *Hodgson* (2); *In re De Falbe* (3), which was the case of a tenant for life and not a mere lessee. Of course every case must be considered on its own merits,

(1) (1820) 2 Br. & B. 54, 57.
(2) (1872) L. R. 7 C. P. 328, 334.
(3) [1901] 1 Ch. 523, 530, 534.

but the real test is what is the object of the annexation: *In re De Falbe* (1) in the House of Lords, sub nom. *Leigh* v. *Taylor* (2); and see Woodfall on Landlord and Tenant, 21st ed., ch. xvi., s. 8, pp. 793, 794.

There are cases on the point whether wainscoting can be regarded as fixtures: see *Ex parte Quincy* (3); *Elwes* v. *Maw* (4) (for Lord Ellenborough's remarks); *Avery* v. *Cheslyn.* (5) In the present case this panelling cannot be removed without injury to the structure: compare *In re Whaley.* (6) It is submitted that the whole of the scheme which the tenant planned was for the permanent improvement of the premises and not for the mere enjoyment of the panelling by itself. It was intended for the greater enjoyment of the room.

The means used for attaching the panelling to the structure and the mode of annexation were substantial, and could not be said to be temporary. Portions of the walls in these rooms had to be cut away: compare *Hellawell* v. *Eastwood* (7) and the remarks of Parke B.

Further, it is submitted, the covenants in the lease of July 5, 1912, have to be considered: see clause 3, where the tenant covenanted to "quietly leave surrender and yield up unto the landlord together with all fittings belonging to the landlord . . . . and all fixtures (usually denominated landlord's fixtures), which at any time during the continuance of the said term shall be erected on or used or fastened to the demised premises. . . . ." This covenant applies to the installations introduced by the tenant and makes what he has put in landlord's fixtures. The two main guides for the Court to look at are: (1.) the mode and degree of the annexation, and (2.) the object and purpose of the annexation.

There are also cases regarding the removing of chimney pieces: *Poole's* case (8); *Ex parte Quincy* (3); *Lawton* v. *Lawton.* (9)

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(1) [1901] 1 Ch. 523. 530, 534.
(2) [1902] A. C. 157, 158.
(3) (1750) 1 Atk. 477.
(4) (1802) 3 East, 38, 53.
(5) (1835) 3 Ad. & El. 75.
(6) [1908] 1 Ch. 615.
(7) (1850) 6 Ex. 295, 312.
(8) (1703) 1 Salk. 368.
(9) (1743) 3 Atk. 12, 15.

In the present case the onus is on the defendants to show that these panellings have retained the character of tenant's fixtures. The result of the alterations as disclosed by the report of the surveyor shows clearly that what the tenant intended was the permanent improvement of the flat; none of the alterations is quite the same as that referred to in the cases cited. What the tenant did here shows that he did not regard the panelling as a chattel, but as an improvement of a permanent nature. Also as to the degree of annexation, the quantum is wholly incompatible with its use merely as ornament. One test in determining whether a landlord's fixture becomes a tenant's fixture is whether on a removal injury is caused to the structure or premises, or to the panelling itself or both: see observations of Blackburn J. in *Holland* v. *Hodgson.* (1) Here the panelling put in by the tenant must be considered as landlord's fixtures, and as such cannot be removed by the defendants.

R. Peel K.C. and *J. G. Trapnell* for the defendants. The fixtures are tenant's fixtures. The answer to the question, what is or what is not a tenant's fixture, is shown in the intention of the person who puts it up: *Leigh* v. *Taylor* (2); *In re Hulse* (3) for the remarks of Buckley J. Again the degree and object of the annexation must be considered: *Holland* v. *Hodgson.* (1) *Hellawell* v. *Eastwood* (5) is not applicable here. The whole thing is really a question of intention.

[LUXMOORE J. Lord Macnaghten in *Leigh* v. *Taylor* (6) seems to have stated the real point in this class of case.]

As to the degree of annexation, it is submitted that the evidence shows that no portion of the structure has been altered by the erection of either the oak or pine panelling: see as to the object of annexation the remarks of Stirling L.J. in *In re De Falbe.* (7) The removal of a few bricks by the fireplaces has nothing to do with the fixing of the panelling;

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(1) L. R. 7 C. P. 328.
(2) [1902] A. C. 157.
(3) [1905] 1 Ch. 406, 411.
(4) L. R. 7 C. P. 328, 334, 338.
(5) 6 Ex. 295.
(6) [1902] A. C. 157, 162.
(7) [1901] 1 Ch. 523, 541.

their removal was necessary for the enjoyment of the panelling. On the question of the cornice see *Avery* v. *Cheslyn.* (1) The question of removing an ornamental chimney piece by a tenant was referred to in *Leach* v. *Thomas* (2); and compare *Bishop* v. *Elliott.* (3) It is obvious that in order to put in a new mantel piece a certain amount of alteration to the premises is necessary. The test is shown in *Hellawell* v. *Eastwood.* (4)

In *Ex parte Barclay* (5) Lord Cranworth for himself and the Lords Justices expressed a view as to the meaning of fixtures; and see *Martin* v. *Roe.* (6)

As regards the covenant in the lease of July 5, 1912, the words "demised premises" mean "the structure of the house."

[LUXMOORE J. Really the only question here is, are these installations tenant's fixtures or not ?]

Yes. They are tenant's fixtures and removable by the defendants.

Macaskie K.C. in reply.

LUXMOORE J. [after stating the facts, continued :] The question which I have to determine is, what was the purpose and object with which this panelling was put in ? There are two questions that arise. It is said that this panelling and these fireplaces or mantel pieces have been put in in such a way that they have become landlord's fixtures and cannot be removed by the tenant or his assigns during the existence of the term. Alternatively, it is said that on the true construction of the lease under which Mr. Phillipson held the property this panelling and these chimney pieces cannot be removed.

I think it is well settled that whatever is affixed during the currency of the lease to the freehold forms part of that freehold and cannot be removed unless it falls within certain well known exceptions. In the case of landlord and tenant

(1) 3 Ad. & El. 75, 78.
(2) (1835) 7 Car. & P. 327.
(3) (1855) 11 Ex. 113.
(4) 6 Ex. 295, 312.
(5) (1855) 5 De G. M. & G. 403, 410.
(6) (1857) 7 El. & Bl. 237, 248.

from the earliest times relaxations of the strict rule have been recognized, and these relaxations have been wider with the advance of time and the change of fashion. My attention has been called to a large number of cases, and I do not propose to refer to all of them, not from any disrespect for the arguments which have been addressed to me, but because I think that these cases are really only of assistance so far as they lay down principles; and, as has been said in many of the cases, the question to be determined must necessarily depend upon the circumstances of each particular case.

I think, perhaps, the earliest authority I need refer to is *Buckland* v. *Butterfield.* (1) That case was decided in the year 1820; in it Dallas C.J. said this: "The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste.—In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like." It is to be observed that among the things that are specifically mentioned are ornamental chimney pieces and wainscot. "Wainscot" is, I think, a proper technical term for what is oak panelling affixed to the walls of an apartment for decorative purposes. "Wainscot" is defined in the Oxford English Dictionary, vol. x., Part II, (1928), first as meaning, "a superior quality of foreign oak, imported from Russia, Germany, and Holland, chiefly used for fine panel work, ... oak boarding for panel work"; and secondly as "panel-work of oak or other wood, used to line the walls of an apartment."

The passage which I have read in Dallas C.J.'s judgment in *Buckland* v. *Butterfield* (1) has been referred to in many other cases. The next case which really gives a summary of the position is *Elliott* v. *Bishop* (2), in which Martin B. said this—I am reading from the quotation made from his judgment in Stirling L.J.'s judgment in *In re De*

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(1) 2 Br. & B. 54, 58.

(2) (1854) 10 Ex. 496, 507.

Falbe (1)—"The old rule laid down in the old books is, that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he or his representatives can afterwards take it away, the maxim being 'Quicquid plantatur solo solo cedit': *Minshall* v. *Lloyd.* (2) But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of Law and Equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated 'fixtures'; and the best definition with which I am acquainted is that given in the judgment of this Court in *Hallen* v. *Runder* (3), namely, that they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removable, and of course saleable, at the will of the person who has annexed them." I think, as Stirling L.J. goes on to point out (4), that it is clearly established that as between landlord and tenant ornamental objects are included in the exception.

In *Holland* v. *Hodgson* (5) Blackburn J., in delivering the judgment of the Court, referred with approval to what was said by Parke B. in *Hellawell* v. *Eastwood* (6), and adopted it as the test in cases of this kind. The passage to which I refer, is as follows:—"This is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed integrè salve et commode or not without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, perpetuĭ usûs causâ, or in that of the year book, pour un profit del inheritance, or merely for a temporary purpose and the more complete enjoyment and use of it as a chattel." I think in fact, that these are not two considerations, but really only one consideration; what was the object and purpose of the annexation?; and that among the matters which have to be considered in coming to a conclusion in answer to the question, what was the object and purpose of the annexation, are first the mode of annexation, and secondly, what would happen if the mode of annexation were severed, and it is sought to take the particular things away.

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(1) [1901] 1 Ch. 523, 538.
(2) (1837) 2 M. & W. 450.
(3) (1834) 1 Cr. M. & R. 266.
(4) [1901] 1 Ch. 523, 539.
(5) L. R. 7 C. P. 328, 336.
(6) 6 Ex. 295, 312.

I think the present law is clearly summed up in the speeches of the learned law Lords in the *De Falbe* case, *Leigh* v. *Taylor* (1) in the House of Lords. The passage I particularly refer to is that in the judgment of Lord Macnaghten, where, as is not infrequently the case, he puts the law in a nutshell. What he says is this: "It seems to me that the only question is, have these tapestries"—the case was about some tapestries which had been put into a house of which Madame De Falbe was tenant for life—"become part of the freehold? I think they were purely matter of ornament, and not part of the freehold at all. Mr. Levett has spoken of the Courts changing the law. I do not think the law has changed. The change I should say is rather in our habits and mode of life. The question is still as it always was, has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of

(1) [1902] A. C. 157, 162.

annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times." Most of the learned law Lords in their speeches have really said the same thing. I might point out this. Lord Halsbury in his speech in considering the question, what was the object and purpose of the annexation in the particular case, proposed this further question (1): "Suppose this had been a tenant from year to year, and she put up these things, is it conceivable that a person would for the purpose of a tenancy from year to year put up these things exactly in this way if thereby she made a present of 7000*l.* to the landlord ?"

In the present case I have to consider what is the object and purpose of the annexation. Mr. Head in his report has shown how this panelling is annexed to the property and what has been done. Annexation, as Lord Macnaghten pointed out, is only one of the matters that has to be considered and may to-day be anything but the most important. I find from the evidence that the panelling and the mantel pieces are valuable chattels. They were bought by Mr. Phillipson for the purpose of decorating the flat in which he lived, and which he had taken for a term of twenty-one years. At the time he put in the oak panelling there were only some thirteen years of the term to run. When he put in the pitch pine panelling there was still less of his term to run, only some eleven years. Again I have to consider the interest of the person who puts the particular chattel into the property and bear that in mind in answering the question, what was the object and purpose of the annexation ? As I pointed out Mr. Phillipson was a tenant for a term of years. It would be a little surprising if this gentleman were to spend 5000*l.* in purchasing panelling and have it put in on the footing that he would only enjoy it for eleven or thirteen years, and at the end of that time he would lose all interest in it, and it would belong to a complete stranger, i.e., the landlord of the premises. It might be quite a different matter if the question was one which had arisen between a tenant for life and remaindermen, the tenant for life being the parent or near relative of those who were to take after him. Where in such circumstances you have a mere tenant for years, one cannot help asking one's self the question : Was it likely that he meant to make a gift of the panelling to a complete stranger ? Further he must be taken to have known that he would have to make good all damage which had been done by reason of his putting up this panelling in the flat.

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(1) [1902] A. C. 157, 159.

The next thing I have to consider is the method of attachment. There is no doubt about this. Mr. Head has, at the request of the parties, made a very clear report, and what he says about the panelling is this : "It does not appear that any portion of the structure of these rooms—that is rooms A, B and C—was altered in order to fix the panelling, ceilings and frieze. Wooden plugs and nails were inserted into the brickwork as described in the answer to question (iii.)." When you look at question (iii.)—so far as rooms A, B and C are concerned—the panelling is stated to be fixed in the same way in each of those rooms, i.e., "by inserting into the wall face a number of wooden plugs to which the panelling is attached by means of screws." In those three rooms—I will deal with them I think together —there has been a frieze put above the panelling and a false ceiling (except in room A) above the frieze. Mr. Head says : "The frieze consists [in each case] of a light wooden framework upon which canvas is stretched covered with paper or other similar material, giving the appearance of solidity. The frieze in itself is not fixed to any member, either of the panelling, cornice or the wall, but is held in position by (1.) a fillet attached to the top rail of the panelling ; (2.) the false bed moulding of the cornice"—which had been previously mentioned—"and (3.) vertical strips of wood nailed to the wall." In room A he states there was no false ceiling. In room B he says there was a frieze of fibrous plaster fixed in a similar manner, "but kept away from the original wall surface by strips of wood which are fixed to the wall." In that room there was a false ceiling, which he describes as being fixed by "two strips of wood running across the room [and which] have been attached to the original ceiling. From these strips other strips hang vertically. On the lower ends of the vertical strips are secured light ceiling joists which pass right across the room and rest at their extremities on strips of timber called plates, nailed or screwed to the wall." The false ceiling itself he describes as being also "composed of slabs of fibrous plaster (i.e., plaster upon a canvas backing) screwed to the joists, the joists and screw holes being made good with plaster." The false ceiling in room C and the frieze at the end are fixed in a similar way.

Two expert witnesses were called in addition by Mr. Peel, and each of them said that the method described in Mr. Head's report would be the ordinary way of affixing oak panelling of this kind to a room which had already been built, whether it was to be fixed permanently or merely for a temporary purpose. It is plain that if you have anything in the nature of heavy oak panelling it must be fixed much more firmly than perhaps tapestry or light articles of that kind. But, as I have already pointed out, the method of attachment is only one of the things which one has to consider.

Now let me consider the case of the pitch pine panelling in room D. Mr. Head in his report states: "The panelling here is partly screwed and partly nailed to battens of wood nailed to the walls. There is no false ceiling in this room. The frieze is a portion of the panelling. The cornice is of wood, and, like the skirtings and architraves, is a part of the panelling. It is screwed to wooden brackets, which in turn are fixed to the wall, the original cornice having been removed." In that particular room in order to put in the panelling, I think the evidence shows that the skirting boards, the cornices, the window linings and the architraves of the doors of the original decoration have been entirely removed, but so far as the panelling in all the rooms is concerned, there is no structural alteration at all.

With regard to the chimney pieces and fireplaces, again there has been a very small cutting away of the original brickwork to allow these chimney pieces and fireplaces to be fixed so that they would be capable of being used for the purpose for which

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they were designed. The actual amount cut away is shown on the plan to Mr. Head's supplemental report, which was made by the agreement of the parties. It shows, I think, in room D that the total amount of the brickwork cut away amounts to some 6¾ inches of brickwork, i.e. 3⅜th inches on each side of the fireplaces. In room B it does not appear that there has been any cutting away at all, and in room A the cutting away appears to be to the extent of 4¼ inches on each side of the chimney piece. It is quite true that is an interference with the structure, but it is an interference of so small a nature that one certainly could not say that in putting in these chimney pieces and "period" fireplaces the structure has been so materially altered or interfered with that it could be inferred that it was the intention of the person who put them in, (in face of all the other matters that have to be considered) to make this a permanent gift to the freeholder.

Considering, as I am bound to do, all those matters, what is the conclusion that I must come to in this case? I have not any doubt that what Mr. Phillipson was intending to do was to put up the panelling and to put in the chimney pieces, and to add to the decoration of the room for the more complete enjoyment of the panelling and the chimney pieces certain friezes and false ceilings. That it was for decoration is probably true, but the whole object and purpose of his work was for himself to enjoy the panelling and chimney pieces which he had bought and for which he had paid large sums of money. On the evidence before me I cannot come to the conclusion that his object and purpose were merely to beautify the rooms of which he had only some thirteen years' tenancy to run. I am satisfied that, asking myself the question, what was the object and purpose of the annexation of this panelling and these chimney pieces, the answer must be, the enjoyment of the chattel by the purchaser. If that is the answer to the question, the only conclusion I can come to, having regard to all the cases, is that these things have not become landlord's fixtures. They are tenant's fixtures, and being tenant's fixtures they are removable by the tenant during the currency of his tenancy. Mr. Phillipson

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is dead, and they are now vested in his executors, who are entitled to remove them.

But it is said, as part of the argument, that these must have passed to the landlord, that in removing them damage will be done to the things themselves; it is not that the damage done to the panelling will destroy it or anything of that kind, all that is said is if you take down panelling of this antiquity some damage will necessarily result; but the panelling will still remain valuable panelling, and I can see nothing in that circumstance to outweigh the other matters which I have to consider. Then it is said that if these things are taken away there will be great damage to the structure. In my view when it is said that you must consider the damage done in the removal, it does mean the damage to the structure. It does not mean damage done merely to those things which form the decoration of the particular room; it is damage to the fabric or structure. In the present case these things can be removed. It is quite true damage will be done to the plaster and the ceilings, and so on, and when the fixtures are removed it will be necessary to replace some of them with skirting boards, window linings, etc. But those circumstances are not in my opinion sufficient to outweigh the other considerations which have led me to the conclusion that these are tenant's fixtures and not landlord's fixtures.

That being the conclusion at which I have arrived, it is necessary for me to consider the question of construction. It is said that on the true construction of this lease, even if these are tenant's fixtures, they still pass to the landlord under the provisions of the covenants in the lease, clause 3. The provision in clause 3, which is relied on, is at the end of it; that is the covenant to yield up the demised premises "together with all fittings belonging to the landlord including those mentioned in the list annexed hereto and all fixtures (usually denominated landlord's fixtures) which at any time during the continuance of the said term shall be erected on or used or fastened to the demised premises. . . ." If I stop there, it is plain that the only things which have to be handed over with the demised premises are landlord's fixtures and fittings described in the particular list. There is nothing there to include tenant's fixtures, and if it was intended to include tenant's fixtures, one would expect to find tenant's fixtures expressly mentioned. Reliance is placed on the six words which follow : " . . . . and all improvements and additions thereto." It is either all improvements and additions to the demised premises, or all improvements and additions to the landlord's fixtures. Assuming that it is to the demised premises, as I think is the proper construction, the demised premises in this lease are defined as meaning the premises hereby demised, which are first of all described as the flat and the fixtures in the list. In this particular clause the definition which is given in the lease does not seem to have been adhered to in any way. The words "the demised premises" appear on five or six separate occasions, and in each case they are used in a sense which does not include the fixtures which are mentioned in the list at all. When you come to the covenant which is relied on, and which I have to construe, you find that the demised premises are mentioned together with all fittings belonging to the landlord, including those mentioned in the list and all fixtures usually denominated " landlord's fixtures." It is difficult to see that the words " demised premises " can there include, in themselves, the landlord's fixtures or the fittings in the list. If that is the right construction, then the words " all improvements and additions thereto," that is to the demised premises, mean all improvements and additions to the structure of the demised premises, and do not include anything in the nature of tenant's fixtures.

This disposes of the whole of the case. The result is that the claim to the panelling and the chimney pieces—I should say here that the chimney pieces in my view include the whole of the fireplaces—fails, and they are removable by the defendants as the persons who are now entitled to the lease granted to the late Mr. Phillipson. The plaintiff's claim therefore fails and with the usual consequences. Of course, if the defendants during their tenancy remove the panelling, the chimney pieces and the fireplaces, they will have to make good all the damage done by them and restore the premises, so that when they hand them over they are in accordance with the covenants and the provisions of the lease.

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The plaintiff appealed. The appeal was heard on January 26 and 27, 1931.

N. L. C. Macaskie K.C. and *G. P. Slade* for the appellant repeated the arguments used by them in the Court below.

R. Peel K.C. and *J. G. Trapnell* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This case raises a very interesting point on which we have had helpful arguments from Mr. Macaskie and from Mr. Slade. The matter that we have to determine is whether certain panelling which was put into a flat is to be treated as a tenant's fixture, and so removable by the tenant or his personal representatives, or whether it passed to the landlord by virtue of having been annexed to the landlord's freehold, or rather in this case to premises held on a long lease.

The facts are these. It seems that a Mr. Paxton, who had a long term from the ground landlord, Lord Howard de Walden, granted a lease on July 12, 1912, of a flat at 74 Portland Place to the late Mr. Ralph Phillipson. It was for a term of twenty-one years, determinable in the year 1933. The flat was an important one, the rent was 900*l.* a year, plus half the increase of rates which should be imposed in respect of the flat beyond the rates at which they stood at the time of the lease. The late Mr. Phillipson was minded to decorate his flat in a way which suited his taste, in an expensive manner, but a manner not at all unknown or very unusual at the present time. There are just a few letters which passed, but they carry the matter really no further. In 1920 Mr. Phillipson put in some oak panelling, it was of the late Tudor or early Jacobean period, and in order to

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fix it there is no doubt that he removed a certain amount of furnishings, the woodwork that would be put in the flat in the shape of skirtings and oak furnishings to the windows, and the like. That panelling, it appears, cost Mr. Phillipson somewhere in the neighbourhood of 2000*l.* In 1922 he decorated another room by putting in some pine panelling, also of an expensive nature, old panelling of about the date 1720. That panelling at the present time has probably, according to the evidence before us, become enhanced in value. We do not know the exact price which was paid for the pine panelling, but we are told that the panelling in these rooms, if removed and sold to a willing purchaser, would pass to him at something like a price of 5000*l.* Those figures are comparatively unimportant; they take their proper place in perspective as indicating that the panelling was of considerable value, that it was of the nature of an ornament and a luxury which Mr. Phillipson wanted to enjoy in the way in which it could be enjoyed—namely, by being set up in this flat at Portland Place. Some little remark is made upon this, that in July of 1922, a few months before the pine panelling was put in, we find Mr. Phillipson writing to Mr. Paxton, who at that time was his immediate landlord, asking Mr. Paxton's leave to remove a partition which was in room D, the purpose of the removal being to throw two rooms together and so get a larger room. Later some letters passed between Mr. Wheeler, an agent, and Mr. Phillipson at a time when it was suggested, in 1928, that there being only something like five years of the lease to run it would be a suitable time for Mr. Phillipson to secure a new lease, or at any rate an extension of the old one. Those letters are these. Mr. Wheeler writes on October 24, 1928: "As to the terms of a grant of a new lease, it is somewhat difficult for me to overlook the potentialities of the flat at the reversionary date. I should imagine, having regard to the expensive panelling and equipment generally, that it would demand a rental of 2000*l.* per annum exclusive of rates and taxes, plus a premium for a lease of 21 years." Turning that into money value, it would look as if the additions which had been made by Mr. Phillipson enhanced the value of the flat by something like 1000*l.* a year, because it is not merely that this rent is to be exclusive in the future of apparently all rates and taxes, but the lease is also to command a premium. If Mr. Wheeler is right, if one is to contrast that enhanced rent with the previous rent of round about 1000*l.*, and even disregarding the possibility of a premium, it would look as if, in Mr. Wheeler's mind, in October of 1928 this flat had acquired an increased value of something like 1000*l.* a year. If I am not putting it on too high a scale, it is difficult to estimate that value at less than 17,000*l.* or 20,000*l.* That is only a confirmation of the fact that what had been done by Mr. Phillipson was to erect a very valuable panelling on a site which was suitable for its erection. Mr. Wheeler then gives some confirmation of his figures from another flat which he had let, and there is a letter from Mr. Phillipson of October 26. He is considering whether he would like to take a new lease; the time was passing, and he was getting near the three-score years and ten. He says in the letter: "The little inner suite alone . . . . cost me about 20,000*l.*," and he goes on to say that much of it had been earmarked as a gift to the Victoria and Albert Museum. Changes had then taken place in his domestic conditions, and he looked at the matter from a somewhat different point of view from that which he had when the expenditure had been made. Mr. Wheeler in reply reaffirms the position which he had taken up, that the solicitors had informed him that "while you are under no obligation to reinstate the partitions you removed at the time the alterations were made, you are not at liberty to remove at the end of your term any of the wood panellings installed by you." On the other hand, Mr. Phillipson took the view that he was entitled to remove these panellings, and was not prepared to leave them behind. I have only referred to that correspondence as indicating that it was clear that Mr. Phillipson's intention was, so far as the law allowed, to remove these panellings; and the view now presented by the evidence that they were of great value is abundantly reinforced by Mr. Wheeler's letters showing what a largely increased sum could be obtained for the flat in the condition in which Mr. Phillipson had put it. Unhappily, at the end of that November, 1928, Mr. Phillipson died. The matter passed therefore to his executors, and on March 1, 1929, the writ in this action was issued, a writ by which the landlord seeks to restrain the defendants, the executors of Mr. Phillipson, from removing the panelling which Mr. Phillipson had put in.

After reading the judgment of Luxmoore J. I should be prepared really to leave the matter where he has left it; he has recounted the facts and given, if I may respectfully say so, a lucid judgment upon the law to which it seems unnecessary to add anything. In deference, however, to the arguments that we have had from Mr. Macaskie and from Mr. Slade, I will venture to add a few remarks in support of the judgment which we are now affirming. It is a mere truism to say that in our law anything that is affixed to the freehold passes with the freehold and cannot, as a rule, be removed or severed from the freehold. But upon that there have been engrafted a number of exceptions, relating to fixtures which have been put in either by the craftsman who has been working in the house, the tenant who has been occupying it, or by a tenant for life. In all those cases a number of exceptions have been engrafted, enabling the tenant to remove what has been put into the premises, not for the purpose of final inclusion in their structure, but in order that the tenant might enjoy them more freely. The question that we have to determine in this case is, do the facts which are before us compel the inference that this panelling was fixed, so that the removal of it was no longer contemplated; that the panelling had been finally made an integral part of the dwelling-rooms; or is the right inference that the panelling had been put up with the intention on the part of the tenant of removing it as and when he was minded so to do, and that the affixing of the panelling was only for the purpose of the complete enjoyment by the tenant of that expensive panelling? It is to be remembered that this claim on the part of the representatives of the tenant is made during the currency of the term. Different considerations apply where the tenant has not attempted to exercise his right until after the expiration of the term.

We have had our attention called to a number of cases, but those cases are illustrations of how the law upon this subject has gradually been relaxed in favour of the tradesman and certainly largely in favour of the tenant. When we look at the cases themselves it will be found that tenants have been allowed to remove matters of ornament which for their enjoyment required very considerable affixture to the premises. In particular, going as far back as 1703, we find a catalogue of such matters as chimney pieces, wainscots, chimney glasses, pier glasses, hangings and the like, which have been allowed to be taken away. I pause for a moment at chimney pieces, because certainly for the safe enjoyment of such structures it is necessary that very substantial attachment of them should be provided. Here we have this panelling fixed in the rooms, and it has been fixed, as appears from the evidence, in the only way that it could be properly fixed, whether it was set up for permanence or whether it was set up with a view to its removal. Attention has been rightly called to the fact that not only has the panelling been set up, but there have been structural alterations made to the aperture for the fireplaces and chimney pieces, that the furnishings of the windows have been removed, and also that there have been ceilings attached to the original ceilings, so as to make them more in keeping with the proper period to which the panelling belonged. One little point arises upon that to which I think it is worth while calling attention, a point which I made in the course of the argument. That is, that if, in the report of Mr. Head, an examination be made of his little sketch, whereby, I think it is in room A, it is seen how the panelling is set up and the frieze above it attached to the wall, it will be observed that instead of attaching that frieze to the substance of the wall itself care was taken to make a temporary structure of framed canvas, bringing that forward, so that the wall as it stood was allowed to remain in its original condition behind the frieze. It is said that that was necessary in order that the frieze might be as nearly as may be in a vertical line with the panelling, but again I am by no means satisfied that what I have called the bracket which runs round the top of the panelling was a part of the original panelling, or whether that was not a part which had necessarily to be superimposed in order to fit the old panelling together. But in any event it seems to me that that structure for the purpose of carrying the frieze was of the nature of a temporary structure, faithfully preserving the moulding behind it, whereas a simpler, a more durable, and possibly less expensive method might have been adopted, unless a marked intention had been revealed to make the totality of the structure one which could be afterwards taken down.

I do not think we need go back in the cases beyond the tapestries case of *In re De Falbe.* (1) In that case it is quite right to observe that there was a much lighter method of affixing than has been here adopted, but when one looks at the judgment of Vaughan Williams L.J. he says (2): "There is this amount of consistency" in the cases, "that, starting with the absolutely rigid rule, 'Quicquid plantatur solo solo cedit,' there has been a consistent progress towards relaxation of that rule, and in my view there has never been any substantial intermission of that relaxation." An obvious observation falls to be made. He is speaking in 1901, I am speaking in 1931, a generation later. If therefore this case is not, perhaps, exactly within the decision or the rule in the *De Falbe* case (1) (though I think it is), yet it would only be another illustration that there has been a consistent progress towards the relaxation of the rule against tenants being required to hand over their fitments to the landlord. He says (3): "In dealing with the question of fixtures it sometimes becomes material to consider the object and purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed them, but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case." Then he adds (1): "That being so, it is impossible to say that the only matter to be taken into consideration is the quantum of fixture." The observation there made is approved and followed by Lord Macnaghten in his speech in that same case when it was before the House of Lords, sub nom. *Leigh* v. *Taylor.* (2) He says this (3): "The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times." We have therefore a rule showing that the tenant's right has been consistently, steadily and progressively enlarged, that the quantum of attachment is a factor, but not more than a factor, and not always the most important factor for decision. Then what are the other factors to consider? I think one must consider: Why was the article or ornament ever brought into the flat at all? Was it for the permanent enhancement of the building itself, or was it for the enjoyment of the ornament itself? In the same case Lord Halsbury says (4): "The principle appears to me to be the same to-day as it was in the early times, and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir. I am of opinion that this tapestry has not become part of the house, and was never intended in any way to become part of the house; and I am, therefore, of opinion that this appeal ought to be dismissed," and he says that the rule, whether it be between tenant for life and remainderman, or whether it be between landlord and tenant concerning the attachment and so on of these factors is practically the same. With that guidance before us, and with the definition of "fixtures" which Stirling L.J. (5) gives in that case, which is also quoted, I observe, by Luxmoore J., "'they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removable, and of course saleable, at the will of the person who has annexed them,' " I ask myself the question: Is there any evidence such as to compel one to come to the conclusion that this expensive panelling was put up some ten or a dozen years before the expiration of the lease in order that the value of the flat might be enhanced for the benefit of the landlord, rather than put up for the purpose of the enjoyment of those ornaments by the tenant himself? Ornaments may vary from one generation to another, but it would appear that at the present time devices are resorted to to make a room look as our ancestors 100 or 200 or 300 years ago would have liked it to look. That is still a matter of ornament at the present time.

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(1) [1901] 1 Ch. 523.
(2) [1901] 1 Ch. 534.
(3) [1901] 1 Ch. 535, 536.

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(1) [1901] 1 Ch. 535, 536.

(2) [1902] A. C. 157.

(3) [1902] A. C. 162.

(4) Ibid. 161.

(5) [1901] 1 Ch. 523, 538.

The criticism that has been made, and quite fairly made, by Mr. Macaskie that you find the tenant doing very considerable injury to the premises by abstracting the skirting boards and the fitments of the windows and the like, has, to my mind, but little bearing upon the problem. Quite true it is that the tenant thereby exposed himself to a liability for breach of covenant, and involved himself in a liability of replacement to a value which may be not inconsiderable; yet all those are matters of detail, detailed risks which the tenant might be prepared to run in order to be able to set up this ornament that he wanted to enjoy. He may have been quite conscious that he was committing a breach of covenant in cutting away these details, but ready to run the risk, for at any time he could, of course, on terms have obtained relief from the proviso for re-entry, which was the safeguard against his committing this breach of the covenant. On these grounds it appears to me that the tenant has not lost his right of removal, that although he is liable to reinstate the premises you cannot deduce from that an intention on his part—or rather, to use the words of Vaughan Williams L.J., you cannot infer that the object and purpose of the annexation was to benefit the premises and the landlord rather than for the purposes of his own temporary enjoyment.

The last point that is left is the question which has been raised, and quite rightly raised, by Mr. Slade on the interpretation of the covenants. I am content to leave that as Luxmoore J. left it, because I agree with him upon it. I will only add this, that I think with regard to the last clause, in which you have the phrase "landlord's fixtures," it seems to me very difficult, where the landlord's fixtures have been actually in terms referred to, to make an implication from the other more general words that it was intended that all "improvements and additions thereto" should somehow embrace and include tenant's fixtures. I will not add anything more on that point.

In my judgment I agree with Luxmoore J., and the appeal must be dismissed with costs.

LAWRENCE L.J. The main point taken by the appellants is that the extent to which the tenant has interfered with the demised premises in affixing the panelling conclusively demonstrates that his intention was to improve the demised premises, and not the better to enjoy the panelling as a chattel. For the reasons stated by my Lord and by Luxmoore J., with whose judgments I entirely concur, I am of opinion that the point so taken, in view of the other facts of this case, is not a good one, and that the appeal ought to be dismissed.

ROMER L.J. I agree. I merely desire to say this. Luxmoore J., in the course of his judgment and after referring to the well known passage in Parke B.'s judgment in *Hellawell* v. *Eastwood* (1), said: "I think in fact, that these are not two considerations, but really only one consideration; what was the object and purpose of the annexation?; and that among the matters which have to be considered in coming to a conclusion in answer to the question, what was the object and purpose of the annexation, are first the mode of annexation, and secondly, what would happen if the mode of annexation were severed, and it is sought to take the particular things away." Speaking for myself, I think that that is a correct statement of the law. So long as the article can be removed without doing irreparable damage to the demised premises I do not think that either the method of annexation or the degree of annexation, or the quantum of damage that would be done to the article itself or to the demised premises by its removal, has really any bearing upon the question of the tenant's rights to remove, except in so far as they throw light upon the question of the intention with which the chattel was affixed by him to the demised premises. That, I think, is entirely consistent with the view that was expressed by Vaughan Williams L.J. in his judgment in *In re De Falbe.* (1)

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(1) 6 Ex. 295, 312.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Johnson, Weatherall, Sturt & Hardy.*
Solicitor for defendants: *J. D. Arthur.*

W. I. C.

MAUGHAM J.
1931
Jan. 30.

In re SAVILE SETTLED ESTATES.

SAVILE *v.* SAVILE.

[1930. S. 3040.]

Settlement—Law of Property—Mining Leases by Tenant for Life—Power of Tenant for Life to vary the Leases—Settled Land Act, 1925, *ss.* 41, 42, 52, 59, *sub-s.* 1.

The tenant for life under a resettlement executed in 1884 granted two mining leases, in 1924 and 1928, respectively, each for the period of 60 years. On a summons asking for the determination of the question, among others, whether he had power, under s. 59 of the Settled Land Act or otherwise, to vary the leases by substituting in each of them a term of 100 years in lieu of the term of 60 years:—

Held, that he had power to vary by deed the terms of the leases, provided that their length after variation should not be more than 100 years from the respective dates of execution.

Observations on the effect in law of extending the term of a lease.

ADJOURNED SUMMONS.

By an indenture of resettlement dated January 30, 1884, and made between Augustus William Savile and the Right

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(1) [1901] 1 Ch. 523, 536.

Hon. John Savile Baron Savile (hereinafter called "the plaintiff") (by his then name and description of John Savile Lumley) of the first part, Baron Savile (by his then name and description of Sir John Savile Lumley) of the second part and the Right Hon. Arthur FitzGerald Baron Kinnaird (by his then name and description of the Hon. Arthur FitzGerald Kinnaird) and William Lipscombe of the third part, among other hereditaments, divers manors, messuages, lands, tenements and hereditaments situate in the counties of York and Nottingham, and commonly called "the Savile Estates," were limited and settled to certain uses and upon certain trusts therein declared, being uses and trusts under which the same estates, on the death of the said Baron Savile on November 28, 1896, became limited and settled to the use of or in trust for the plaintiff during his life without impeachment of waste and from and after his decease to the use of or in trust for the first and every other son of the plaintiff successively in remainder one after another according to their respective seniorities and the heirs male of their respective bodies, and in default of such issue to such uses upon such trusts and with and subject to such powers and provisions as the plaintiff should at any time or times by any deed or deeds with or without power of revocation and new appointment or by his will or any codicil thereto direct, limit and appoint, and in default of and until such direction, limitation and appointment and so far as there might be no such direction, limitation or appointment then to the uses upon the trusts and with and subject to the powers and provisions thereby made applicable thereto by reference to the uses, trusts, powers and provisions limited, declared and contained by and in the will and codicil therein mentioned of the Right Hon. John Savile Lumley Savile Earl of Scarborough.

The plaintiff was married twice, having no issue by his first marriage, and having issue by his second marriage, two sons and one daughter—namely, the Hon. George Halifax Lumley Savile, a younger son born in 1923 and a daughter born in 1928.

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By a lease dated June 26, 1928, and made between the plaintiff of the one part and the Stanton Ironworks Company of the other part, the plaintiff in exercise of all powers conferred on him by the Settled Land Act, 1925, and of every other power enabling him, demised to the said company certain mines, seams, or beds of coal therein described, with liberty to search for, work, get and raise the said coal thereby demised, and to convert, make merchantable, carry away and dispose of for the said company's own use and benefit the said coal thereby demised, and other liberties, powers and rights therein set forth. Clause 4 of the said lease provided that the said premises should be held by the said company from February 1, 1925, for the term of 60 years determinable as thereinafter provided.

By this summons the plaintiff asked for the determination of the question, among others, whether the plaintiff had power, under s. 59 of the Settled Land Act, 1925, or otherwise (1) to vary a mineral lease dated May 27, 1924, from the plaintiff to the Butterley Company, Ld., and also the mineral lease dated June 26, 1928, from the plaintiff to the Stanton Ironworks Company, Ld., by substituting in clause 4 of each of those leases a term of 100 years in lieu of the term of 60 years.

A. F. Topham K.C. and *R. F. Roxburgh* for the summons. The question for decision is whether the term can be extended under s. 59 of the Settled Land Act, 1925, without the expense and trouble of a surrender. The tenant for life is

(1) Sect. 59, sub-s. 1: "A tenant for life may, at any time, by deed, either with or without consideration in money or otherwise, vary, release, waive or modify, either absolutely or otherwise, the terms of any lease whenever made of the settled land or any part thereof, or any covenants or conditions contained in any grant in fee simple whenever made of land with or subject to a reservation thereout of a rent which is or forms part of the settled land, and in either case in respect of the whole or any part of the land comprised in any such lease or grant, but so that every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Act if the lease had been surrendered, or the land comprised in the grant had never been so comprised, or had been regranted."

in terms given power to vary the terms of any lease. The "terms of the lease" comprise the period for which the lease is granted, and it would be right and proper that the tenant for life should vary those terms. He can execute a deed by which the term of 60 years can be varied and become a term of 100 years. There is an express limitation in the section that "every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Act if the lease had been surrendered, or the land comprised in the grant had never been so comprised, or had been regranted." The Act contemplates that if a surrender is made, there can be a grant of a new lease for an extended term.

[They referred also to ss. 41 and 42 of the Settled Land Act, 1925. (1)]

(1) Sect. 41: "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, for any term not exceeding—
  (i.) In case of a building lease, nine hundred and ninety-nine years;
  (ii.) In case of a mining lease, one hundred years;
  (iii.) In case of a forestry lease, nine hundred and ninety-nine years;
  (iv.) In case of any other lease, fifty years.

Sect. 42: (1.) Save as hereinafter provided, every lease—
  (i.) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;
  (ii.) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case;
  (iii.) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(2.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life or statutory owner, of which execution and delivery the execution of the lease by the tenant for life or statutory owner shall be sufficient evidence.

(3.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life or

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The wording is wide enough to show that the tenant for life can vary the terms of the lease. It may be that the stamping authorities would say that, for purposes of stamping, that has the same effect as if the estate had been regranted; but difficulty arises if the mining lessees are asked to surrender the term, though it may be that the result is the same. It is not altogether clear what the position of sub-lessees would be if there were an actual surrender. Halsbury's Laws of England, vol. xviii., p. 550, s. 1061, states that: "Any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy; and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder, provided a substantial difference is thereby made in the conditions of the tenancy. But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end."

In a case in which a landlord and a tenant have made an arrangement to alter a lease the jury is entitled to infer from that that there is a new lease. A tenant for life could enter into a transaction of that kind if he were a tenant in fee

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statutory owner, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

(4.) A fine received on the grant of a lease under any power conferred by this Act shall be deemed to be capital money arising under this Act.

(5.) A lease at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made—

(i.) Where the term does not exceed twenty-one years—
  (*a*) without any notice of an intention to make the lease having been given under this Act; and
  (*b*) notwithstanding that there are no trustees of the settlement; and

(ii.) Where the term does not extend beyond three years from the date of the writing, by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent."

simple: *Fenner* v. *Blake*. (1) It would be convenient in the present case if the tenant for life were able to vary the term by a deed doing nothing more than extend the term from 60 to 100 years.

G. Whitehead for the infant defendant. The question whether the operation is or is not to be by surrender and regrant does not really matter. What is required is an answer to the question whether the term can be extended.

Droop for the trustees. At common law a variation of the length of the term effects a surrender by operation of law and a regrant. A variation of the rent has the same effect: *Donellan* v. *Read*. (2) A declaration that a tenant for life can under s. 59, sub-s. 1, of the Settled Land Act, 1925, lengthen the term of a lease might confer on him a power which a tenant in fee simple does not possess, as the subsection implies that a lease varied under it still remains the same lease. The power to vary given by the sub-section is limited to cases where the variation would not at common law effect a surrender and regrant. The transaction can be carried out under s. 52 of the Settled Land Act, 1925. (3)

MAUGHAM J. It appears that the tenant for life under this settlement granted certain mining leases for the period that was authorized by the Settled Land Act then in force—namely, 60 years. Two leases in particular are mentioned in the summons, and the tenant for life is desirous now of altering the terms of those leases, by changing them into leases for terms of 100 years each from the date when the leases took effect. The Settled Land Act, 1925, which is in force, contains two sections which are material in considering whether the tenant for life has the right to do this. Sect. 52 provides [His Lordship read the section, and continued :] Sect. 59 provides (and this section was new in the Act of 1925) [His Lordship read sub-s. 1, and continued :] It is apparent, in my opinion, that s. 59, sub-s. 1, is dealing only with a question of form, because it is clear from the final words of s. 59, sub-s. 1, that no more is being authorized than what might have been done under s. 52, sub-s. 1. The provision in question is that "every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been" granted after a surrender, etc. In my opinion s. 59, sub-s. 1, is not limited to cases where the result of the variation, release, waiver or modification will at common law effect a surrender and regrant. This section is conferring a power on the tenant for life to execute documents in a particular form which he could have executed in another form as the result of the surrender or the surrender and regrant of the land previously dealt with. It relates to the widest possible release, variation, waiver or modification, including cases in which only part of the land comprised in the old lease or grant is the subject of those alterations. Speaking generally, I think there is no doubt that the law (as stated in s. 1061 in vol. xviii. of Halsbury's Laws of England) is that any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy, and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder; and I would add that it may result from the mere alteration in the amount of rent payable, as seems to have been held in the case of *Donellan* v. *Read.* (1) But the section now under consideration is not concerned with that matter at all; it is only conferring on the tenant for life power to do in a particular form that which might have been done in another way.

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(1) [1900] 1 Q. B. 426.

(2) (1832) 3 B. & Ad. 899.

(3) Sect. 52, sub-s. 1: "A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, or a regrant of any land granted in fee simple, whether under this Act or not, in respect of the whole land leased or granted, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them, and with or without an exception of any easement, right or privilege of any kind over or in relation to the land surrendered or regranted."

In my opinion, therefore, the plaintiff, as the tenant for life, has power, with or without consideration in money or otherwise, by deed to vary, release, waive or modify, either absolutely or otherwise, the terms of either of the two leases mentioned in the first paragraph of the summons, including the length of the leases there in question, provided that the leases shall, after the alteration, be leases for terms not exceeding 100 years from the dates when they respectively took effect. I do not propose in the declaration to say that it is done under s. 59, but I propose to say that the tenant for life has power to execute such documents.

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(1) 3 B. & Ad. 899.

I should add that, in my opinion, an alteration of an existing lease so that it will operate for a term extending beyond the original term can operate, in law, only as a surrender of the old lease and a grant of a new one, and I am disposed to think that the wiser course in the circumstances would be to add, after the declaration that I have mentioned, the statement that "the declaration is made without prejudice to the question whether the leases, as altered, will not at common law operate by way of surrender and regrant."

Solicitors: *Raymond-Barker, Nix & Co.; Attree, Johnson & Ward.*

K. R. A. H.

C. A.

1930

LUXMOORE J.

Dec. 5, 19.

C. A.

1931

April 15, 16.

In re JENKINS.

JENKINS *v.* DAVIES.

[1930. J. 1752.]

Will—Bequest of Moneys invested in Swansea Harbour Trust—Statutory Substitution of Great Western Railway Stock for Swansea Harbour Stock—Subsequent Death of Testator—Effect on Bequest—Great Western Railway (Swansea Harbour Vesting) Act, 1923 (13 *&* 14 *Geo.* 5, *c. xix.*), *s.* 12.

The undertaking of the Swansea Harbour Trustees was vested in the Great Western Railway Company by the Great Western Railway (Swansea Harbour Vesting) Act, 1923, which provided that stock of the Great Western Railway should be issued to holders of stock of the trustees in substitution therefor.

Sect. 12 of the Act provides: "Stock of the company substituted by virtue of this Act for any stock of the Trustees . . . . shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock . . . . for which by virtue of this Act the stock of the company is substituted . . . . and any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock . . . . shall be deemed to be a reference to the stock of the company . . . . by virtue of this Act substituted therefor":—

Held, that the latter part of the section was not restricted in meaning by regard to the first part, and that it applied to any reference to stock of the trustees in any "document instrument or writing" in existence when the Act of 1923 came into force, even though the "document instrument or writing" was not then effective to create trusts liens charges powers or other legal or equitable rights privileges or restrictions.

By his will made in 1913 a testator bequeathed "the sums of 3500*l.* and all other moneys that I may at my death possess invested in the Swansea Harbour Trust" upon certain trusts. In 1923 the testator received, pursuant to the Act of 1923, 2800*l.* 5 per cent. consolidated preference stock of the Great Western Railway Company in substitution for his holding of 3500*l.* 4 per cent. Swansea Harbour stock, and continued to hold the Great Western Railway stock till his death

Held (1.), that the reference in the will to the property bequeathed was a reference to stock of the Swansea Harbour trustees within the meaning of the Act.

(2.) That by virtue of the latter part of s. 12 of the Act the bequest operated to pass the substituted Great Western Railway stock.

Decision of Luxmoore J. reversed.

ORIGINATING SUMMONS.

By his will dated September 30, 1913, Owen Thomas Jenkins (hereinafter called "the testator") after appointing

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his wife Gwenllian sole executrix thereof and three persons therein named trustees, and after a bequest of moneys and of certain shares and stock to Martha Jane Davies (therein described as his daughter) absolutely and a further bequest therein mentioned to his trustees upon trust for his said wife for her life and after her death upon trust for the said Martha Jane Davies absolutely, made the following further gift and bequest: "And I give and bequeath the sum of 3500*l.* and all other moneys that I may at my death possess invested in the Swansea Harbour Trust . . . . unto my trustees upon trust that my trustees may either permit the same to remain in their present state of investment which I hereby expressly empower my trustees to do during such period or periods as they shall think fit without being responsible for loss or may at their discretion call in and convert the same into money and re-invest the proceeds . . . . And upon trust that my trustees shall stand possessed of the whole of the said moneys and shares and of the proceeds of the calling in and conversion thereof and of the investments for the time representing the same (all of which are hereinafter called by and included in the expression 'the trust funds') in trust to pay the income thereof to my said wife Gwenllian during her life for her own use and benefit and after her death in trust to pay the income of the trust funds to my said daughter Martha Jane Davies during her life for her separate use without power of anticipation during any coverture and after her death in trust as to both capital and income of the trust funds for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter Martha Jane Davies . . . ."—as she should by deed or will appoint. In default of appointment there was a gift over for all her children who should attain the age of twenty-one years or marry in equal shares as tenants in common. The testator gave all his residuary personal estate whatsoever to his wife absolutely and beneficially subject to the payment of his debts, funeral and testamentary expenses and death duties.

The testator's wife died in his lifetime on November 16, 1924, and therefore the residuary gift in her favour lapsed.

The testator died on December 17, 1928, without having remarried, and on October 23, 1929, letters of administration of his estate with the will annexed were granted by the Principal Probate Registry to the plaintiffs to the summons as the lawful statutory next of kin of the testator.

The testator died without lawful issue, and his statutory next of kin were the two plaintiffs. Martha Jane Davies (one of the defendants to the summons), who was referred to by the testator in the will as his daughter was not, by reason of the circumstances of her birth, one of his next of kin.

Martha Jane Davies survived the testator and was married to one Howard B. Davies. She had seven children, all of whom were infants and defendants to the summons.

When the testator made his will, he was entitled to 3500*l.* 4 per cent. stock authorized by the Swansea Harbour Act, 1886, and he continued to hold that stock until 1923. In that year the undertaking of the Swansea Harbour Trust became vested in the Great Western Railway Company under the provisions of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, and as the result of that Act, on October 3, 1924, a certificate for 2800*l.* 5 per cent. consolidated preference stock of the Great Western Railway Company was issued to the testator in substitution for the 3500*l.* 4 per cent. stock of the Swansea Harbour Trust formerly held by him. This sum of 2800*l.* 5 per cent. consolidated preference stock was held by the testator at the time of his death.

An originating summons was accordingly taken out by the plaintiffs, as the administrators with the will annexed of the testator, for the determination (inter alia) of the question whether on the true construction of the will and the Great Western Railway (Swansea Harbour Vesting) Act, 1923, the bequest of the sum of 3500*l.* and all other moneys that the testator might at his death possess in the Swansea Harbour Trust was a valid disposition of the sum of 2800*l.* 5 per cent. consolidated preference stock of the Great Western Railway Company held by the testator at his death, or whether this stock formed part of his residuary estate.

Humphrey H. King for the plaintiffs, the sole next of kin of the testator. The private Act of the Great Western Railway Company, the Great Western Railway (Swansea Harbour Vesting) Act, 1923, must be considered; ss. 2, 4, 5 (*c*) and 7. Sect. 12 is also very important. (1) The gift is not in any sense a specific gift of stock in the Swansea Harbour Trust; it is a gift of moneys; the testator did not hold any stock at his death in the Swansea Harbour Trust; and s. 24 of the Wills Act, 1837, applies.

Again, there is no reference in the will to "stock" at all. It is clear on the authorities that this gift would not pass stock in the Great Western Railway Company: *In re Slater* (2); *Mytton* v. *Mytton*. (3) Sect. 12 must be construed strictly; the word "stock" is used, and if the Act says "stock," it means "stock." The word is not mentioned in the will. The substituted stock in the Great Western Railway Company does not pass under the bequest of "moneys" in the Swansea Harbour Trust.

W. F. Swords K.C. and *A. J. Belsham* for the defendants. The section (s. 12) should be given the fullest possible force. There is nothing to cut down the effect of what were the trusts at the date of the will.

If there is any reference to "stock" at all in the will it should be treated as referring to substituted stock. The actual word "stock" need not be mentioned if you can find from the words used that what the testator really meant was "stock." The case of *In re Anderson* (4) assists our contention.

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(1) Great Western Railway (Swansea Harbour Vesting) Act, 1923, s. 12: "Stock of the Company substituted by virtue of this Act for any stock of the Trustees or (as the case may be) any cash paid under this Act to the holders of mortgages granted by the Trustees shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock or mortgages for which by virtue of this Act the stock of the Company is substituted or the cash is paid and any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock or mortgages shall be deemed to be a reference to the stock of the Company or (as the case may be) the cash by virtue of this Act substituted therefor."

(2) [1907] 1 Ch. 665, 670.

(3) (1874) 44 L. J. (Ch.) 18.

(4) [1928] W. N. 46; 44 Times L. R. 295.

It is submitted that the words used in the section are used in the widest possible manner. The substituted stock in the Great Western Railway Company should be held to pass that which the testator gave by his will in the Swansea Harbour Trust.

Humphrey H. King in reply.

Cur. adv. vult.

Dec. 19. LUXMOORE J. The question on which I reserved my judgment relates to the meaning and effect of a gift in the will of Owen Thomas Davies of "the sum of 3500*l.* and all other moneys that I may at my death possess invested in the Swansea Harbour Trust." The gift, which also comprised certain other shares, was made to the testator's trustees upon certain trusts. [His Lordship read the material portions of the will.]

In 1923 the undertaking of the Swansea Harbour Trust became vested in the Great Western Railway Company under the provisions of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, and as a result of that Act on October 3, 1924, a certificate for 2800*l.* 5 per cent. consolidated preference stock of the Great Western Railway Company was issued to the testator in substitution for the 3500*l.* 4 per cent. stock of the Swansea Harbour Trust formerly held by him. If the matter rested there there could be no question but that the gift in the will was adeemed. But it is said that by reason of the provisions of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, the original gift of the 3500*l.* operated to pass the 2800*l.* Great Western Railway 5 per cent. consolidated preference stock.

The material sections to be considered are ss. 2, 4, 5, 7 and 12 of the Act in question. Sect. 2 provides that the expression "the date of vesting" means July 1, 1923. Sect. 4 provides that, "On and from the date of vesting the undertaking of the Trustees"—that is the Swansea Harbour Trust—"is hereby transferred to and vested in and shall form part of the undertaking of the Company"—that is the

Great Western Railway Company—" and on and from the said date the Trustees are hereby dissolved except for the purpose of winding up their affairs." Sect. 5 provides that, (1.) " Subject to the provisions of this Act the Company shall forthwith after the date of vesting as the consideration for the transfer . . . .—: (*c*) issue to every person who on the date of vesting shall appear in the books of the Trustees as the holders of Swansea Harbour four per cent. or Swansea Harbour four per cent. ' A ' stock in lieu of and in exchange for the stock so held by him an amount of five per cent. consolidated preference stock of the Company "—that is the Great Western Railway Company—" bearing interest on and from the date of vesting in the proportion of eighty pounds of the said preference stock for every one hundred pounds of the said four per cent. stock or four per cent. ' A ' stock held by him on the said date and every such person shall on the date of vesting become and be the holder of such amount of the said preference stock accordingly." Sect. 7, sub-s. 1, provides that, " Every person who by virtue of this Act becomes the holder of stock of the Company . . . . shall (subject to the provisions of this Act) accept and be deemed to have accepted such stock . . . . in substitution for the stock . . . . held by him . . . . and in satisfaction of all claims in respect thereof." Sub-s. 2 of the same section provides that, " On and from the date of vesting all charges and securities constituted by any stock or mortgages at any time issued or granted by the Trustees shall cease and determine or be deemed to have been discharged by re-conveyance, re-assignment or release as the case may be."

Sect. 12—and this is the section on which Mr. Swords, who appeared for the defendant Martha Jane Davies and her children, placed most reliance—provides that, " Stock of the Company substituted by virtue of this Act for any stock of the Trustees . . . . shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock . . . . for which by virtue of this Act the stock of the Company is substituted . . . . and any reference in any Act of

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Parliament deed will codicil book document instrument or writing to any such stock . . . . shall be deemed to be a reference to the stock of the Company . . . . by virtue of this Act substituted therefor."

Mr. Swords claimed that by reason of the provisions of this section the testator's will must be read as if instead of the words "the sum of 3500*l.* and all other moneys which I may at my death possess invested in the Swansea Harbour Trust" there had been inserted the following words, "the sum of 2800*l.* 5 per cent. consolidated preference stock of the Great Western Railway Company." Is this contention correct? Sect. 12 provides that the Great Western Railway stock substituted by virtue of the Act for the Swansea Harbour Trust stock shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions *as affected* the original Swansea Harbour Trust stock for which it was substituted. This must, in my judgment, on the true construction of the Act, refer to trusts or interests which were in fact subsisting at the date when the section came into operation. The words in their proper grammatical meaning are not wide enough to cover future trusts which may come into existence at some future date. Mr. Swords admitted that if the section stopped at this point, the construction I have referred to would be correct, but he relied on the words which follow, "and any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock"—that is Swansea Harbour Trust stock—". . . . shall be deemed to be a reference to the stock of the Company . . . . by virtue of this Act substituted therefor." In my judgment those words cannot properly be construed as widening the scope of the preceding parts of the section so as to embrace future as well as existing interests. I think the words are merely complementary to the preceding words of the section and were inserted for the purpose of giving complete effect thereto. In my judgment this is the proper construction of the section, but it is said that there is a decision of Russell J. which prevents the adoption of this construction—namely, *In re Anderson. Public Trustee* v. *Bielby.* (1) In that case the testator by his will dated March 9, 1922, gave "all my stocks and shares of whatsoever kind in the Great Eastern Railway" to a legatee. After the date of the will—namely, in January, 1923—the Great Eastern Railway and five other companies were amalgamated as the London and North Eastern Railway Company. Under the amalgamation scheme the testator received 1050*l.* 5 per cent. ordinary stock and 1350*l.* deferred ordinary stock of the London and North Eastern Railway in place of the 3000*l.* ordinary stock of the Great Eastern Railway, which he held in November, 1922. Between August, 1923, and March, 1925, the testator bought 3800*l.* deferred ordinary stock in the London and North Eastern Railway Company, making his total holding of deferred ordinary stock in that company up to 5150*l.* nominal value. On May 12, 1926, he made a codicil to his will confirming it. He died in December, 1926. Clause 16 of the amalgamation scheme provided: "Stock of the Company substituted by virtue of this scheme for stock of the six companies shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights and privileges and restrictions as affected the stock for which by virtue of the scheme the same is substituted and any reference in any Act of Parliament deed will codicil book document instrument or writing to stock of the six companies shall be deemed to be a reference to the stock of the company substituted therefor by virtue of this scheme." It will be seen that the clause referred to is for all practical purposes the same as s. 12 of the 1923 Act to which I have already referred. The question raised was whether the 1050*l.* 5 per cent. ordinary stock and/or the 5150*l.* deferred ordinary stock of the London and North Eastern Railway Company passed under the bequest of "all my stocks and shares of whatsoever kind in the Great Eastern Railway Company." According to the report in the Weekly Notes, Russell J. construed the bequest of "all my stocks and shares in the Great Eastern Railway

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(1) [1928] W. N. 46; 44 Times L. R. 295.

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Company" as falsa demonstratio, and as a bequest of all the stock owned by him which had been formerly Great Eastern Railway stock, that is, as a bequest of the 1050*l.* 5 per cent. ordinary stock and 1350*l.* deferred ordinary in the London and North Eastern Railway. The report goes on to state that the legatee was not entitled to the 3800*l.* deferred ordinary stock in the London and North Eastern Railway Company because it was not stock of the company substituted by virtue of the scheme for stock of the six companies. The report in the Times Law Reports is fuller, but both reports show quite plainly that the learned judge decided the question as to the destination of the 1050*l.* 5 per cent. ordinary stock and the 1350*l.* deferred ordinary stock in the London and North Eastern Railway Company not with regard to clause 16 of the amalgamation scheme which he said made no difference (i.e., did not affect the question), but with regard to the date of the codicil which enabled him to come to the conclusion that the testator was describing something which he had at the date of the codicil and to reject the reference to the Great Eastern Railway Company stock as being still in existence as falsa demonstratio. Indeed, if the learned judge had considered that clause 16 of the scheme applied, there was no need to make any reference at all to the doctrine of falsa demonstratio. In my view this decision not only does not prevent the adoption by me of the construction to which I have referred, but supports the view I have expressed as to it. It is further said that Astbury J. in an unreported case purported to follow the view of the decision of *In re Anderson* (1) which Mr. Swords stressed before me. Mr. Swords referred me to the order made in that case but not to any of the material documents. It is therefore difficult to ascertain exactly what Astbury J. decided. Mr. Swords, however, admitted that the construction of s. 12 (which I have stated) was not called to the attention of the learned judge. In the circumstances I have come to the conclusion that the will in the case before me is not, on the true construction of

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(1) [1928] W. N. 46; 44 Times L. R. 295.

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s. 12 of the 1923 Act, within the ambit of that section and consequently it does not apply to this case.

But assuming I am wrong on this point the further point arises, is there in this will any reference to "stock" within the meaning of s. 12 of the Act of 1923? Sect. 12 provides that any reference in any will to any such stock or mortgages—that is stock or mortgages of the Swansea Harbour Trust—shall be deemed to be a reference to the stock of the company substituted therefor. There is in fact no reference to either stock or mortgages of the Swansea Harbour Trust in the will. The reference is to the "sum of 3500*l.* and all other moneys that I may at my death possess invested in the Swansea Harbour Trust." In my judgment it is impossible on this ground also to hold that s. 12 has any application and there is therefore no justification for reading in the place of the description of the money invested in the Swansea Harbour Trust the sum of 2800*l.* 5 per cent. preference stock of the Great Western Railway Company.

In the result I hold that the gift of the sum of 3500*l.* and all other moneys which the testator might die possessed of in the Swansea Harbour Trust does not operate to pass the 2800*l.* 5 per cent. consolidated preference stock in the Great Western Railway Company, but that this last mentioned stock forms part of the testator's residuary personal estate.

A. R. T.

C. A.

The defendants appealed. The appeal was heard on April 15, 16, 1931.

W. F. Swords K.C. and *A. J. Belsham* for the appellants. The gift of the sum of 3500*l.* invested in the Swansea Harbour Trust operates to pass the sum of Great Western Railway preference stock substituted for it under ss. 4 and 5 (*c*) of the Great Western Railway (Swansea Harbour Vesting) Act, 1923. That is by reason of the latter part of s. 12, which is an independent provision wide enough to apply. The second part of the section is not connected with or limited in effect by the

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first part: compare *In re Anderson* (1) and *In re Macartney.* (2) The first part of the section prevents the substitution from affecting any trust or right in existence at the date of the Act; but the second part goes further, and provides that any reference in any existing writing to Swansea Harbour stock is to be deemed a reference to the substituted stock. It may be that a will which has not been rendered operative by the death of the testator is not a will for the purpose of the section, but such a will is clearly a "document," an "instrument" and a "writing." The limited construction given to the section by Luxmoore J. really involves reading words into the section and construing the second part as though it read: "and in connection therewith any reference," etc.

[LORD HANWORTH M.R. referred to a passage from Lord Loreburn's judgment in *Larsen* v. *Sylvester & Co.* (3), approving a statement by Fry L.J. in *Earl of Jersey* v. *Neath Poor Law Union.* (4)]

The passage deals with the operation of such general words as "of what kind soever" to exclude the ejusdem generis rule. So the repeated use of the word "any" in the second part of s. 12 suggests a complete breakaway from the earlier part of the section. The appellants are entitled to succeed.

Humphrey H. King for the respondents. It is clear that but for s. 12 of the Act the bequest of moneys invested in the Swansea Harbour Trust would have been adeemed. *In re Anderson* (1) and *In re Macartney* (2) do not assist the Court in construing the section. Nor is the use of the words "any reference . . . . to any . . . ." sufficient to show an intention to break away from the preceding part of the section, especially as the whole section consists of a single sentence.

[ROMER L.J. If Luxmoore J. is right the second part of the section was an unnecessary addition.]

It is not contended that the second part of the section goes no further than the first part, but that, in the light of the first part, it must be given a less wide construction than is contended for by the appellants. It must be limited in application to a reference in an "Act of Parliament deed, will, codicil, book, document, instrument or writing" conferring rights.

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(1) [1928] W. N. 46.; 44 Times L. R. 295.
(2) [1920] W. N. 132.
(3) [1908] A. C. 295, 296.
(4) (1889) 22 Q. B. D. 555, 566.

Further, there is no reference in the testator's will to Swansea Harbour stock but to money invested in the Swansea Harbour Trust.

For s. 12 to apply the stock must be expressly mentioned. It is not suggested that the words in the will would not be taken for most purposes as meaning Swansea Harbour stock, but that they are not a sufficiently express reference to the stock to make s. 12 apply.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. The point we have to determine is what is the effect and true meaning of s. 12 of the Great Western Railway (Swansea Harbour Vesting) Act, 1923? [His Lordship stated the terms of the testator's will and continued:] Let me clear up at once one matter that arises. What is the meaning of the expression "moneys that I may at my death possess invested in the Swansea Harbour Trust"? At the time that the will was made the testator had 3500*l.* 4 per cent. Swansea Harbour stock, being a stock issued under the Swansea Harbour Act, 1886. Is the passage in the will a reference only to money or does it connote the Swansea Harbour stock? I am clearly of opinion that the testator has designated by those words the stock he held. They were not a reference to money, but to money which had been invested or turned into something else—namely, Swansea Harbour stock.

After the will was made the Act in question was passed for transferring the undertaking of the Swansea Harbour Trustees to the Great Western Railway Company. Provisions were made under it for the payment off of sums due from the Swansea Harbour Trustees under mortgages granted by them to the total amount of 757,900*l.*, and as regards the stock issued under the Act of 1886 and the "A" stock issued under later Acts for the issue to the holders of Great Western Railway 5 per cent. Consolidated

Preference Stock in lieu of or in exchange for the stock held by them. That was all provided for by ss. 5 and 7. The recitals to the Act indicate that difficulties had arisen in the working of the Swansea Harbour Trust, and that the undertaking of the trustees was to be transferred to and become vested in the Great Western Railway Company as part of their undertaking. The result was that on October 3, 1924, the testator received 2800*l.* Great Western Railway 5 per cent. Consolidated Preference Stock in substitution for the 3500*l.* 4 per cent. Swansea Harbour stock.

It is plain that the words of the gift in the will would not convey the Great Western Railway stock by words indicative of the stock of the Swansea Harbour Trust. But to meet any difficulty arising from the change of stock s. 12 of the Act was passed. Luxmoore J. has found, however, that s. 12 did not effect the identification of the new Great Western Railway stock with the stock intended to be referred to in the will. It is plain that the purpose of s. 12 was to overcome the difficulty of identifying stock which was previously stock of the Swansea Harbour Trust. That this was the purpose appears on the face of the section itself, and especially the words in the last few lines of the section, which seem to be of wide application. The learned judge has held, however, that the wide provision in the last part of the section is affected or dominated by what was contained in the earlier part of the section. The first part of the section says: "Stock of the Company substituted by virtue of this Act for any stock of the Trustees or (as the case may be) any cash paid under this Act to the holders of mortgages granted by the Trustees shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock or mortgages for which by virtue of this Act the stock of the Company is substituted or the cash is paid." The meaning of that is plain. No one who had previously held a mortgage or stock of the Swansea Harbour Trust could, when he received cash or stock of the Great Western Railway under this Act, declare that the cash or stock was held by him independently of or without being

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affected by the "trusts liens charges powers and other legal or equitable rights privileges and restrictions" which had previously affected his holding in the Swansea Harbour Trust. Where there were any rights, privileges or restrictions affecting a holding of Swansea Harbour stock continuity was preserved by the earlier part of the section.

But the section then continues: "and any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock or mortgages shall be deemed to be a reference to the stock of the Company or (as the case may) the cash by virtue of this Act substituted therefor." Now we have got to give some meaning to all the words in the section, and it seems to me that if we interpret the section in the narrow way adopted by Luxmoore J., the last five lines of the section become otiose. If we treat the section as only referring to cases where rights, legal or equitable, or trusts are affected, it is difficult to see why these words were necessary. On the other hand it may well be that the Legislature thought it right to provide for every case where there was transmutation of the stock, and realized that there might be cases which were not covered by the earlier words of the section. It is a fundamental principle in construing an Act of Parliament to give to it its ordinary and grammatical meaning if this produces no repugnancy or inconsistency. In his speech in *Grey* v. *Pearson* (1) Lord Wensleydale said (2): "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Applying that dominating principle we find that attached to the earlier words in the second part of the section is a word that suggests that it is intended to have a further added and independent effect beyond what is achieved by the earlier part of the section. That appears then to be the right and proper way to construe s. 12, and, if so, we have in this writing or instrument or document a reference to Swansea Harbour stock which is under the latter part of the section to be deemed a reference to the stock of the Great Western Railway.

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(1) (1857) 6 H. L. C. 61.

(2) 6 H. L. C. 106.

Mr. King fairly and freely admitted that if matters had remained unchanged between the date when the will was made and the testator's death, he would have been compelled to accept the view that the testator intended to bequeath the 3500*l.* Swansea Harbour stock; but he suggests, first, that the learned judge was right in thinking that the last five lines of the section added nothing, and, secondly, that these five lines when properly construed did not apply to the stock in question, because the stock was not referred to in a document which was effective at the time that the Act was passed, and the section is only intended to apply to an effective document. I reject both the arguments. I think the intention of the last part of the section is to sweep up all other cases so as to insure that in no case should there be a lapse owing to the transmutation of one stock into the other. We find therefore in the section words sufficient to carry the appellants' contention that the will by virtue of s. 12 passed the 2800*l.* 5 per cent. Consolidated Preference Stock of the Great Western Railway substituted for the stock mentioned in the gift in the will.

I leave out of consideration the question whether the document in question is a " will " within the meaning of the section, although I would point out that in common parlance a testator who had signed his will would always answer the question whether he had made his will in the affirmative. It may be that the word in the section means something that has become an effective testamentary document. I am by no means sure that it is so. It may well be that the word in the section is intended to include a will in the ordinary sense, including a will that has not become operative. But it is unnecessary to discuss this further, as there are other words in the latter part of the section which undoubtedly apply. This will, though an ambulatory document when the Act of 1923 was passed, was a "document," an "instrument" or a "writing."

Therefore the section covers the present case, and the gift in the will of 3500*l.* 4 per cent. Stock of the Swansea Harbour Trust passes the 2800*l.* Great Western Railway stock substituted therefor.

LAWRENCE L.J. The short question in this case is whether the bequest of "the sum of 3500*l.* and all other moneys that I may at my death possess invested in the Swansea Harbour Trust" operated in the events which happened to pass a sum of 2800*l.* 5 per cent. stock of the Great Western Railway of which the testator died possessed. The answer to this depends on the true meaning of s. 12 of the Great Western Railway (Swansea Harbour Vesting) Act, 1923.

At the date of his will, which was made in the year 1913, the testator was possessed of 3500*l.* 4 per cent. Stock of the Swansea Harbour Trust, and I am clearly of opinion that the bequest in question referred to that stock and would have passed it, if it had still existed and had been in the possession of the testator at the date of his death. The Act of 1923, however, cancelled all Swansea Harbour stock, substituting therefor Great Western Railway stock, and under the provisions of that Act the testator became the holder of 2800*l.* 5 per cent. stock of the Great Western Railway in lieu of his previous holding of 3500*l.* 4 per cent. stock of the Swansea Harbour Trust.

I agree with the learned judge that but for s. 12 the bequest of the Swansea Harbour stock would have been adeemed. I find myself, however, unable to accept his view, that s. 12 did not operate to save the bequest. In my opinion s. 12 contains two provisions which, although they overlap to some extent, are independent provisions. I cannot read the second limb of the section as a mere appendage to the first limb, inserted for the sole purpose of giving effect to the latter. The first limb of the section, so far as relevant, is broadly speaking a provision that the substituted Great Western Railway stock should be held upon and subject to the same trusts, liens, charges, powers and other legal or equitable rights, privileges and restrictions as affected the stock for which it was substituted. And the second limb provides that "any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock . . . . shall be deemed to be a reference to the stock of the company . . . . by virtue of this Act substituted therefor." The first limb of the section covers all trusts and rights, whether evidenced by writing or not. For instance it would cover resulting and constructive trusts and charges created by deposit of the indicia of title to the stock and verbal contracts made for the sale of the stock. The second limb of the section applies to all documents, whether creating trusts or rights or not. This limb is in my judgment applicable to the present case. The will executed by the testator in 1913, although an ambulatory document, not creating any trusts or rights during his lifetime, was nevertheless a will, an instrument, a document and a writing. It is therefore amply covered by the language of the second limb of the section. The will contained, as I have already stated, a clear reference to the testator's stock of the Swansea Harbour Trust, which reference under the express provisions of s. 12 was to be deemed to be a reference to the substituted Great Western Railway stock, with the result that the bequest operated to pass the latter stock.

I see no ground for confining the second limb of s. 12 to documents creating trusts, charges, powers, etc., within the meaning of the first limb of the section. Not only would such a construction make it necessary to imply some such introductory words as "for that purpose," but it would render the second limb of the section wholly otiose. Moreover such a construction would not give full effect to the natural meaning of the language employed and would fail to carry out the evident intention of the Legislature. It is obvious that grave injustice might result if the limited construction contended for were adopted, especially in cases where a testator had made his will before the Act and had been unable, owing to illness, infirmity or incapacity, to alter it after the passing of the Act.

I agree that the appeal should be allowed and the declaration asked for by the notice of appeal should be made.

ROMER L.J. I agree with Luxmoore J. that the only "trusts liens charges powers," etc., dealt with by the first part of s. 12 of the Great Western Railway (Swansea Harbour Vesting) Act, 1923, are those that affected stock or mortgages of the Swansea Harbour Trust at the date of the substitution for such stock or mortgages of Great Western Railway stock or cash. But I find myself unable to agree that the later words of the section cannot be properly construed as widening the effect of the section, or that they are more or less complementary words not affecting its meaning. I know no principle of construction which prevents us from giving their natural meaning to the words the Legislature has used, and I can see several reasons why they should not be restricted in the manner suggested.

First, if they are to have no more effect than is contended for by the respondents, they have no additional meaning and might have been left out of the section. In the next place it is not difficult to conceive cases not covered by the first part of the section which one would have expected the Legislature to provide for. I suggested in the course of the argument the case of an annuity directed to be paid so long as the annuitant held a fixed amount of stock in the Swansea Harbour Trust. I might also supplement this by the case of articles of association, which provided that a man might be a director of the company only so long as he held stock of the Swansea Harbour Trust. One would have expected the Legislature to make some provision by virtue of which the annuity should not be put an end to or that the director should not cease to be a director by reason of the substitution under the Act of 1923 of Great Western Railway stock for the Swansea Harbour stock.

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I come therefore to the conclusion that we ought to give effect to the natural meaning of both parts of the section, and that the later part of the section should not be cut down by reference to the earlier part. Turning to the later words of that section it is clear that they extend to a testamentary document in existence at the date of the substitution, as if it is not a will within the meaning of the section it is a document or instrument or writing.

The only question that remains is whether in the will, instrument, document or writing there is any reference to stock of the Swansea Harbour Trust for which stock of the Great Western Railway was substituted. I turn to the will, and find that the testator made the bequest in these terms: "I give and bequeath the sum of 3500*l.* and all other moneys that I may at my death possess invested in the Swansea Harbour Trust." The question that it is natural to put is: to what by those words is the testator referring? It can only be to the 3500*l.* stock of the Swansea Harbour Trust held by him. That being so, it is impossible to say that the will contains no reference to Swansea Harbour stock. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for the respondents: *J. Wilmer Hives, for Evans, Thomas & Jones, Llandyssul.*

H. C. G.

EVE J.
1931
May 14, 15.

In re TAYLOR.

TAYLOR *v.* TAYLOR.

[1931. T. 249.]

Will—Construction—Gift of Residue to named Persons in equal Shares—Settlement of single Share—Lapse—" Share to which A. T. shall become entitled"—Intestacy as to Share.

A testatrix by her will gave devised and bequeathed all her residuary real and personal estate to a trustee upon trust for conversion, and to divide the net proceeds of such conversion equally between her four step-children named. The will contained a proviso directing that the share to which A. T., one of her step-daughters, "shall become entitled," should be retained by the trustee upon trust to invest the same, and to apply the income thereof or so much as he should in his discretion think fit towards the maintenance or benefit of A. T. during her life, and to accumulate the residue of the income (if any), and after the death of A. T. the said share settled upon her and the investments and income thereof, and any unapplied accumulations were to be equally divided between the other three step-children. A. T. and another step-child named in the will predeceased the testatrix:—

Held, that as A. T. did not live to become entitled to any share in the residue, the gift lapsed, the settlement failed, and there was an intestacy as to one-half of the residue.

Stewart v. *Jones* (1859) 3 De G. & J. 532 followed.

In re Pinhorne [1894] 2 Ch. 276 distinguished.

ORIGINATING SUMMONS.

The testatrix Ellen Gertrude Taylor by her will dated April 25, 1923, appointed her step-son Sydney Taylor to be sole executor and trustee, and gave him all her furniture and household and personal effects to be disposed of in accordance with any memorandum left signed by her. Subject thereto the testatrix gave devised and bequeathed unto her executor all her real and personal estate upon trust for conversion, and after payment out of the proceeds of such conversion of her debts and funeral and testamentary expenses to stand possessed of the net residue upon trust to pay and divide the same equally between the four children of her late husband—namely, Samuel Robert Taylor, the said Sydney Taylor, Amy Taylor and Mary Adelaide Taylor in equal shares. The

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testatrix further directed that the share to which the said Amy Taylor "shall become entitled under this my will shall be retained by my said executor and trustee in trust to invest the same" in securities authorized for investment by trustees. The trustee was to apply the income of such share or so much as he should in his discretion think fit towards the maintenance or benefit of Amy Taylor during her life and in trust to accumulate the residue (if any) of such income. The will concluded as follows: "And after the death of the said Amy Taylor I direct that the said share settled upon her as aforesaid and the investments and income thereof and the unapplied accumulations (if any) shall be equally divided between the said Samuel Robert Taylor, Sydney Taylor and Mary Adelaide Taylor."

The testatrix died on October 24, 1929, without having had any children, and her will was proved in the Birmingham District Probate Registry on December 27, 1929.

Both Amy Taylor and Samuel Robert Taylor predeceased the testatrix.

The beneficiaries were all step-children of the testatrix, being children of her husband by a former wife and in no way related to her.

The summons raised the question whether, the share given to Samuel Robert Taylor having admittedly lapsed, that settled on Amy Taylor also lapsed, and whether half the net residue was undisposed of and devolved as on an intestacy, or only one-quarter thereof.

Wilfrid Hunt for the plaintiff.

A. Guest Mathews (*B. G. Burnett-Hall* with him) for the defendant Mary Adelaide Taylor. The share of Amy Taylor having been settled for her benefit during her life, with remainder to the other three step-children of the testatrix did not lapse by her death before the testatrix: *In re Roberts* (1); *In re Pinhorne.* (2) The testatrix intended that the "said share settled upon her" should go to the brothers and sisters of Amy upon her death at any time, and it makes no difference that she did not survive the testatrix: *In re Powell* (1); *In re Whitmore* (2); *In re Walter.* (3)

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(1) (1885) 30 Ch. D. 234.

(2) [1894] 2 Ch. 276.

Boraston for the defendant Furber, claiming as next of kin. This is not a settlement of an aliquot portion of the estate, but of the share to which Amy Taylor "shall become entitled." In *In re Pinhorne* (4) the words used referred to a share in which the first taker was only given a life interest, and in *In re Whitmore* (2) similar language was used, showing that the testator intended to settle an aliquot part of the estate. These and other cases are distinguishable. The present case is covered by the decision in *Stewart* v. *Jones* (5), where the settlement was of the shares "to which each of my daughters . . . . shall become entitled." The decision in *In re Roberts* (6) also applies.

EVE J. The question is whether this case falls within the decision in *Stewart* v. *Jones* (5), or whether it comes under a line of cases of which *In re Pinhorne* (4) is the leading example. The testatrix by her will gave devised and bequeathed her residuary real and personal estate upon trust for conversion and after payment of her funeral and testamentary expenses, debts and legacies out of the proceeds, her trustee was to stand possessed of the net residue upon trust for her four children (two sons and two daughters) therein named, in equal shares.

Then follows a clause relating to one of the two daughters. It is in these words: "I further direct that the share to which the said Amy Taylor shall become entitled under this my will shall be retained by my said executor and trustee in trust to invest the same upon such securities as are usually authorized as investments for trustees," with a direction the effect of which was to give the trustees a discretionary power as to the amount of income of the share to be paid to or applied for the benefit of Amy Taylor. And after her death the testatrix directed that the "said share settled

(1) [1900] 2 Ch. 525.
(2) [1902] 2 Ch. 66.
(3) (1912) 56 Sol. J. 632.
(4) [1894] 2 Ch. 276.
(5) 3 De G. & J. 532.
(6) 30 Ch. D. 234.

upon her," and the investments and income thereof should be equally divided between her other three children.

Amy and one of the sons predeceased the testatrix, and the question now to be determined is whether Amy's one-fourth has lapsed, in which case one-half of the residue will be undisposed of.

The will contains an absolute gift of one-fourth share to Amy, but she did not live to take anything, and as the direction to settle affects only the share "to which the said Amy shall become entitled under this my will," there is in my opinion nothing upon which it can operate. A legatee who predeceased the testatrix never had anything but a spes successionis. She takes nothing under the will, consequently nothing is settled. In the case of *In re Pinhorne* (1) Chitty J. came to the conclusion on the will that there was no lapse, because, in effect, the will operated as a settlement which was not displaced by the death of the legatee in the lifetime of the testator. But in referring to the case of *Stewart* v. *Jones* (2), which was relied upon in *In re Pinhorne* (1), and in this present case by those who argued in favour of a lapse, he drew attention to the fact that in that case the direction was to settle the share to which each daughter "shall become entitled under the trusts aforesaid," and after pointing out that the difficulty in that case was to say that a daughter who had died in the testator's lifetime had "become entitled under the trusts aforesaid" to a share, he added: "Now the words I have to deal with in this case are not similar words. The declaration is a settlement of the share as I have read it. It is not a settlement of the share which the sister 'shall become' entitled to"; from which I gather that had the language been that to be found in *Stewart* v. *Jones* (2) the decision in *In re Pinhorne* (1) might have been different.

I think this case is covered by the decision in *Stewart* v. *Jones*. (2) There, as I have already indicated, the settlement was in terms a settlement of the share to which each of the testator's daughters on her attaining twenty-one or marrying

(1) [1894] 2 Ch. 276.

(2) 3 De G. & J. 532.

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under that age "shall become entitled under the trusts aforesaid." The Lord Chancellor (Lord Chelmsford L.C.), in giving judgment, said (1): "What does the testator dispose of in this proviso? Why the shares to which his daughters shall become entitled 'under the trusts aforesaid.' Mr. Bevir said that we are not to look to the gift alone, but to the subsequent part of the will also. I quite agree with him. The terms in which the daughters' shares are settled must be regarded, but they must be applied to a share in existence."

I come to the same conclusion here. The intestacy includes both shares, that of the son, as to which there is no dispute, and that of Amy Taylor as well.

Solicitors: *Sharpe, Pritchard & Co., for Ryland, Martineau & Co., Birmingham; Vizard, Oldham, Crowder & Cash, for Owston & Co., Leicester.*

(1) 3 De G. & J. 535.

H. L. L.

FARWELL J.

1931
April 15.

In re TAYLOR.

PULLAN *v.* TAYLOR.

[1930. T. 2371.]

Administration—Real Estate—Intestacy in 1925*—Infant Heir—Death in* 1926 *in unmarried Infancy—Devolution of Estate—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-ss.* 2, 3; *s.* 117, *sub-s.* 1 (*xxiv.*)*—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 1 (*iv.*); *s.* 51, *sub-s.* 3; *s.* 55, *sub-s.* 1 (*xxiv.*).

In 1925 an infant Sydney inherited land as eldest son and heir of an intestate, subject to his mother's right to dower.

On January 1, 1926, the Settled Land Act, 1925, came into operation, and under s. 1, sub-s. 2, Sydney was treated as deriving his title under the settlement deemed to have been made by the intestate, his mother's right to dower being preserved by sub-s. 3.

On October 8, 1930, Sydney died an infant and unmarried:—

Held, that s. 51, sub-s. 3, of the Administration of Estates Act, 1925, applied to the case of a notional settlement on intestacy, so that Sydney's interest had become an entail and ceased on his death as an unmarried infant. Consequently the estate went to Sydney's younger brother as next heir of the intestate and not to Sydney's mother under s. 46, sub-s. 1 (iv.).

ORIGINATING SUMMONS.

On September 25, 1925, Taylor died intestate, and on November 14, 1925, his widow took out administration to his real and personal estate.

The intestate, who was seised of certain real estate in fee simple in possession, left three children—namely, Sydney, his heir, born August 21, 1911, Doris, born December 15, 1912, and Harry, born June 23, 1919.

On January 1, 1926, the Settled Land Act, 1925, came into operation, and under s. 1, sub-s. 2, Sydney's land became settled land under a settlement "deemed to have been made by the intestate," preserving the widow's right to dower under sub-s. 3.

On May 8, 1926, the widow appointed herself and the plaintiffs Settled Land Act trustees, and executed a vesting assent of the same date.

On October 8, 1930, Sydney died an infant, unmarried and intestate.

In these circumstances the question arose whether the land had passed to the widow, i.e., Sydney's mother under Sydney's intestacy by virtue of s. 46, sub-s. 1 (iv.), of the Administration of Estates Act, 1925, or whether Sydney's estate had become an estate tail under s. 51, sub-s. 3, and ceased to exist, and what became of the reversion in the original intestate.

On December 29, 1930, the plaintiffs issued this summons to determine the point.

F. H. L. Errington for the plaintiffs. The real question is whether s. 51, sub-s. 3, applies to a notional settlement on intestacy. Sect. 55, sub-s. 1 (xxiv.), read with s. 117, sub-s. 1 (xxiv.), of the Settled Land Act, 1925, provides that "unless the context otherwise requires," "settlement" includes "a settlement which is deemed to have been made by any person" for the purposes of the Settled Land Act, 1925. [The other relevant sections are set out in the judgment.]

Horace Freeman for the widow. The context, especially the words "settlement (including a will)," shows that s. 51, sub-s. 3, is limited to actual dispositions by deed or will, and does not apply to a merely notional statutory settlement on intestacy. If it applies, the freehold reversion in the settlor would devolve again on Sydney and the problem would repeat itself ad infinitum. This cannot have been the Legislature's intention.

Droop for the infant defendant Harry Taylor. There is neither context nor reason for excluding a settlement deemed to have been made on intestacy from s. 51, sub-s. 3. Its application does not give rise to the suggested absurdity. Sydney inherited before January 1, 1926, and never became the stock of descent. His inheritance was fully satisfied once for all, but the Legislature has in effect destroyed it. The reversion therefore descends to the next heir, Harry, just as under the old law of inheritance it would have descended to him as next heir of the original intestate, the last purchaser, in the event of Sydney dying intestate.

Horace Freeman replied. (1)

FARWELL J. [after stating the facts:] On and after November 14, 1925, the legal estate was vested in the widow as administratrix and the beneficial interest was vested in Sydney absolutely, subject to the widow's right to dower.

On January 1, 1926, the Settled Land Act, 1925, came into operation.

Sect. 1, sub-s. 2, provides that where an infant is beneficially entitled to land for an estate in fee simple and by reason of an intestacy or otherwise there is no instrument under which the infant's interest arises or is acquired, a settlement shall be deemed to have been made by the intestate, or by the person whose interest the infant has acquired.

Sub-s. 3 provides that an infant shall be deemed to be entitled in possession notwithstanding any subsisting right of dower (not assigned by metes and bounds) affecting the land, and such a right of dower shall be deemed to be an interest comprised in the subject of the settlement and coming to the dowress under or by virtue of the settlement.

The effect of those two subsections is that both the widow and Sydney took under the notional settlement deemed to have been made by the intestate. The widow took her right to dower and subject thereto, Sydney was absolutely entitled with a right to call for a transfer of the property at twenty-one.

If Sydney had attained twenty-one there would have been no difficulty. But he died an infant, unmarried and intestate, and the problem arises.

Sect. 46, sub-s. 1 (iv.), of the Administration of Estates Act, 1925, provides that if the intestate—here Sydney—leaves no issue, but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely.

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(1) N.B.—The difficulties of s. 51, sub-s. 3, are discussed in 30 Sol. J., p. 381.

If that were all, the widow, as Sydney's mother, would take subject to her own right of dower which would merge. But that is not the end of the story.

Sect. 51, sub-s. 3, provides, that where an infant dies after the commencement of this Act, "without having been married," and independently of this sub-section he would, at his death, have been "equitably entitled under a settlement (including a will)" to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, "and the settlement shall be construed accordingly."

Now if the word "settlement" in that sub-section includes a notional settlement deemed to have been made by an intestate on an infant under s. 1, sub-s. 2, of the Settled Land Act, 1925, then on that infant dying without having been married he is to be deemed to have had an entailed interest instead of an absolute interest, and it is suggested that the result of this is to leave a reversion in the settlor—namely, the intestate.

The widow contends that s. 51, sub-s. 3, cannot apply, as if it applied the freehold reversion would oscillate backwards and forwards between Sydney and the intestate and never come to rest, and that cannot have been the Legislature's intention. She also submits that the expression "settlement (including a will)" points to an actual settlement by deed or will and does not apply to a merely notional statutory settlement on intestacy.

Now if the Legislature thought it necessary to make a special provision in the case of an infant dying unmarried under twenty-one, cutting down his absolute interest under a settlement or will to an entail, I have great difficulty in believing that it did not mean to cut it down under an intestacy, now deemed a settlement made by the intestate. I must therefore see if I can give a reasonable meaning to the section, without giving rise to the suggested oscillation of the reversion.

The solution is suggested by the defendant Harry's counsel. Sydney became absolutely entitled subject to dower under the 1925 intestacy. Under the Settled Land Act, 1925, s. 1, sub-s. 2, his interest was treated as derived from a settlement deemed to have been made by the intestate. Then under s. 51, sub-s. 3, his interest, though still potentially absolute, was cut down to an entail if he died an infant and unmarried. In other words the Legislature says to the infant, "If you attain twenty-one or marry the estate is yours absolutely. Otherwise it is only an entail."

The result is this. The descent to Sydney as heir was fully satisfied once for all, and on his death under twenty-one and unmarried, the property goes to Harry the next heir of the last purchaser, i.e., the intestate, just as under the old law of inheritance. That is the result of s. 51, sub-s. 3. Sydney got all he was entitled to, and the reversion, tracing the title from the intestate, goes to Harry. Harry again only takes an entail until twenty-one or marriage, when his estate becomes absolute.

Solicitors: *Collyer-Bristow & Co., for Titley & Paver-Crow, Harrogate.*

G. R. A.

In re CLEVELAND LITERARY AND PHILOSOPHICAL SOCIETY'S LAND.

FARWELL J.

1931

May 5.

BOLCHOW *v.* LAUGHTON.

Literary and Scientific Society—Object of Society to encourage Literature, Science and Art—Freehold Land vested in Trustees for Purposes of the Society—Power of Trustees to raise Money on Mortgage—Trustee Appointment Act, 1850 (13 *&* 14 *Vict. c.* 28)*—Literary and Scientific Institutions Act,* 1854 (17 *&* 18 *Vict. c.* 112)*—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 29*—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 34.

Trusts of land belonging to an unincorporated society, confined to members paying an annual subscription, and the object of which is the encouragement of literature, science and art, and which comes within the provisions of the Literary and Scientific Institutions Act, 1854, are "public trusts" within the meaning of s. 29 of the Settled Land Act, 1925, and the trustees, appointed by deed since 1925, have the powers conferred on them by that section.

ADJOURNED SUMMONS.

The Society was an unincorporated Society, and was formed about 1863. In 1876 it acquired a piece of freehold land and erected on it a building containing a lecture hall, library, reading and committee rooms. This land was conveyed to seven persons, who were trustees for the Society, and was mortgaged by them for 2000*l.* to provide for the purchase price and the cost of erecting the building. A deed dated October 3, 1876, was executed by the seven trustees containing a declaration of trust of the property in favour of the Society. Only those persons who paid an annual subscription were entitled to the use of its premises. Rule 1 of its rules stated that the object of the Society was the encouragement of literature, science and art. All the original seven trustees, who were parties to the deed of 1876, had died, the last survivor of them having died in 1922. No new trustees were appointed until November, 1929. On November 21, 1929, at a duly convened meeting of the Society, the then president of the Society and chairman of the meeting executed a deed appointing the seven plaintiffs to be trustees of the Society. The deed conformed with the statutory form prescribed by the Trustee Appointment Act, 1850.

The property of the Society had greatly increased in value since 1876, and the mortgage of 2000*l.* had been reduced to 500*l.* by payments off from time to time made out of moneys raised and provided by the Society. Its building had remained almost exactly as originally erected in 1876, and it had been proposed that in the interests of the Society the building should be altered, and that the expenses of the alterations should be raised by a mortgage of the property.

Questions having arisen as to the power of the plaintiffs to raise money by way of mortgage, they took out this summons to determine the point. His Lordship held that the Society came within the provisions of the Literary and Scientific Institutions Act, 1854, which incorporated the Trustee Appointment Act, 1850. He further held that s. 34 of the Trustee Act, 1925, did not apply. The question then arose whether, under s. 29 of the Settled Land Act, 1925, the powers of a tenant for life were exercisable in reference to the Society's land, and if so whether they were exercisable by the plaintiffs or by the council of the Society. Sect. 29, sub-s. 1, provided that: "For the purposes of this section, all land vested or to be vested in trustees on or for charitable, ecclesiastical, or public trusts or purposes shall be deemed to be settled land, and the trustees shall, without constituting them statutory owners, have in reference to the land, all the powers which are by this Act conferred on a tenant for life and on the trustees of a settlement."

Nicholson Combe for the plaintiffs. The land is vested in the plaintiffs as the trustees appointed by the deed of 1929. The Trustee Appointment Act, 1850, the provisions of which are incorporated in the Literary and Scientific Institutions Act, 1854, provided for the vesting of land in the continuing and new trustees on the appointment of new trustees, without a conveyance, if the appointment were made by deed. Sect. 7, sub-s. 3 (*c*), of the Law of Property Act, 1925 (15 Geo. 5, c. 20), expressly preserves statutory provisions for the vesting of land in trustees under such a statute as the Act of 1850.

The restrictions on the number of trustees imposed by s. 34 of the Trustee Act, 1925, do not apply, as the land is vested in trustees for public purposes. Sub-s. 3 (*a*) of that section prevents those restrictions applying here.

As there is no power to carry out the proposed alterations, the proposed scheme being meritorious, the Court is asked to authorize it under s. 64 of the Settled Land Act, 1925. It is submitted that s. 64 applies if s. 29 applies. Sect. 29 applies if the land is vested in the trustees for public purposes, within the meaning of sub-s. 1 of that section. If s. 29 does not apply then the sanction of the Court is asked for under s. 57 of the Trustee Act, 1925, but that section is only applicable if ss. 29 and 64 of the Settled Land Act are not applicable. The main point therefore in the case is whether the land is held by the plaintiffs "for public purposes." Those words, as occurring in s. 34 of the Trustee Act and s. 29 of the Settled Land Act, have not as yet been judicially construed. It is submitted that the land is held for public purposes.

C. J. Radcliffe for the president of the Society. The first rule of the Society's rules brings it within s. 29 of the Settled Land Act, 1925. The Society was originated by a number of persons who combined together for the purpose of advancing science, art and literature. That brings it within the definition of a public trust in Lewin on Trusts, 13th ed., p. 16. It is also to be observed that the building as it stands does not lend itself to the purposes of a social club. The members can only modify the trusts within the limits imposed by the Literary and Scientific Institutions Act, 1854. Lord Robertson in *Blair* v. *Duncan* (1) has stated that money given to the funds of a political party or for the raising of a yeomanry regiment is money given for public purposes. It is clear that objects of this Society are public purposes, and that the trusts are for public purposes within the meaning of s. 29 of the Settled Land Act.

Droop for a member of the Society. The proposed alterations to the building are improvements, and come

(1) [1902] A. C. 37, 48.

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within Part II. (iii.) of Sch. III. to the Settled Land Act, 1925. If the case comes within s. 29 of that Act, then the plaintiffs can raise money by way of mortgage under s. 71.

P. J. Sykes for the mortgagee. In *In re Dutton* (1), an institution somewhat similar to the Society in the present case, and in *In re Clark's Trust* (2), a friendly society, were held to be private trusts. In view of those two cases it would be difficult now for the Court to hold that this trust is for "public purposes" within the meaning of s. 29 of the Settled Land Act.

FARWELL J. The question to be decided here is whether the land belonging to the Cleveland Literary and Philosophical Society is vested in the trustees of the Society for "public purposes" within the meaning of s. 29 of the Settled Land Act, 1925, and shall be deemed to be settled land.

The authorities have clearly decided that a Society of this nature is not a charity, and they compel me to hold that this Society is not a charitable Society. Neither is it an ecclesiastical trust. Then the question arises whether it comes within the meaning of public purposes. It is plain on reading s. 29 that public purposes is something different from charitable or ecclesiastical purposes.

In my judgment this land is vested in the trustees for public purposes; it was conveyed to the trustees for the purposes of the Society, the object of which Society under rule 1 of its rules is the encouragement of literature, science and art. It is true that the rules limit the benefits of the Society to members, so that, in the first instance, it is not the general public, but particular members of the public, who benefit, but notwithstanding that, in my judgment the land is in this case held for public purposes within the meaning of the section.

It may be that but for the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), the land of this Society would not be held on public trusts, since apart from that Act it is possible that the members could have put an end to the trust at any time, and disposed as they thought fit of its assets; but that Act expressly provides that on the dissolution of a Society of this kind no profit shall accrue to a member of the Society, but that the assets are to pass to a society of a like nature.

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(1) (1878) 4 Ex. D. 54.

(2) (1875) 1 Ch. D. 497.

The true view is that this property is held primarily on trust for the encouragement of literature, science and art, and not for the benefit of the members; and since the encouragement of literature, science and art is a public purpose, the primary purpose for which the land is held is public. Under these circumstances I think that this is a case of a public and not a private trust, and that it comes within s. 29. There will therefore be a declaration that the land is vested in the plaintiffs as trustees on or for public trusts or purposes within the meaning of s. 29, and that for the purposes of that section the land is deemed to be settled land.

I am further of opinion that the alterations proposed are transactions for the benefit of the land or the persons interested within the meaning of ss. 29 and 64 of the Settled Land Act, 1925, and there will be a declaration that the plaintiffs may raise, by way of mortgage, an amount sufficient to pay the expenses of carrying out those alterations.

Solicitors for all parties: *Iliffe, Sweet & Co., for J. W. R. Punch & Robson, Middlesbrough.*

P. J. B.

BENNETT J.

1931

May 7, 8.

FELL *v.* DERBY LEATHER COMPANY, LIMITED.

[1930. F. 1894.]

Company—Articles of Association—Table A partially Applied—Special Articles—Application of Interpretation Act, 1889—*Companies Act,* 1862 (25 *&* 26 *Vict. c.* 89), *Sch. I., Table A.—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1, *sub-s.* 1.

By the articles of association of a company which was incorporated in 1906 it was provided that Table A in the first schedule to the Companies Act, 1862, should apply to the company, but that certain clauses of Table A should be excluded. In an action by a director against the company and its directors, in which he claimed a declaration that a notice purporting to remove him from the office of director was invalid, the question arose whether s. 1, sub-s. 1, of the Interpretation Act, 1889, which provides that words in the singular shall include the plural and words in the plural shall include the singular, applied to the special articles which were used with Table A:—

Held, that s. 1, sub-s. 1, of the Interpretation Act, which governed Table A, also governed the special articles which were used with Table A, and that, applying this principle to the notice in question, the plaintiff was validly removed from his office of director and that the action failed.

ACTION.

The plaintiff, Mr. Edward Fell, commenced this action against the Derby Leather Company, Limited, Mr. John Henry Warburton and two other defendants for the purpose of establishing that he is still a director of the defendant company. The last two defendants were appointed directors of the company at a date subsequent to September 4, 1930.

The plaintiff alleged that a notice given to him by Mr. J. H. Warburton on September 4, 1930, requesting him to resign his office of director was a notice which had no operation, having regard to the articles of association of the company, and that, accordingly, he continued, notwithstanding that notice, to be a director of the company; and he sought an injunction restraining the defendants from preventing or hindering him from acting as a director and from excluding him from meetings of the company.

The company was formed in the year 1906 and at first, in accordance with the articles, the defendant J. H. Warburton was the sole director, and he continued to be the sole director until the end of 1906. At that time the plaintiff, who had been acting as secretary to the defendant company, subscribed for 650 shares for which he paid cash and then became a director, and until the events which gave rise to the dispute in this action he and Mr. J. H. Warburton were the only directors of the company.

The articles of association provide that Table A of the Companies Act, 1862, shall apply to the company, but certain clauses of Table A were excluded.

One of the special articles used in conjunction with Table A (namely, art. 16) provides: "The office of director shall be vacated . . . . (4.) if he is requested in writing by his co-directors to resign."

On September 4, 1930, disputes having arisen between the plaintiff and Mr. J. H. Warburton, that defendant sent to the plaintiff a notice in these terms: "I the undersigned John Henry Warburton of 24 Kingston Street, Derby, your co-director of the Derby Leather Company, Limited, in pursuance of article 16 of the articles of association of the company hereby request you to resign the office of director of the company."

The plaintiff alleged that that notice was wholly inoperative because, to be of any effect, it must have been given by co-directors and it was only given by his co-director. The defendants contended that, having regard to the true construction of the articles and the Interpretation Act, 1889 (1), one director was entitled to give this notice.

G. R. B. Whitehead for the plaintiff. The notice of September 4, 1930, is invalid. Under art. 16, it was necessary that any notice of that kind should be signed by more than one director. The conduct of the defendants in excluding the plaintiff is in excess of their powers as directors.

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(1) The Interpretation Act, 1889, provides by s. 1, sub-s. 1, as follows: "In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears —(*a*) words importing the masculine gender shall include females; and (*b*) words in the singular shall include the plural, and words in the plural shall include the singular."

[He referred to *Pulbrook* v. *Richmond Consolidated Mining Co.* (1)]

Vaisey K.C. and *R. H. Hodge* for the defendants. Sect. 1, sub-s. 1, of the Interpretation Act, 1889, applies to Table A, which forms part of the Companies Act, 1862. It must, therefore, also be applicable to special articles which are used in conjunction with Table A; otherwise confusion would be caused, as the articles would be governed by two different principles. The word "co-directors" in art. 16 means "co-directors or co-director." It is in accordance with common sense that, where there are only two directors, one director should ask the other director to resign.

BENNETT J. [after stating the facts, continued:] The defendants say that Table A of the Companies Act, 1862, is an Act of Parliament and that, accordingly, in the interpretation of Table A, words in the singular include the plural unless the contrary appears. Mr. Whitehead did not I think seriously contest that contention. Then the defendants say that if it is intended that the provision should apply to Table A it must also be applied to special articles which are used with Table A; otherwise there would be two different principles of interpretation, one governing Table A and the other governing the special articles. It seems to me that the contention of the defendants is the one which ought to be adopted. [His Lordship considered the special articles and, after stating his view that no contrary intention was shown therein, continued:] Applying the Interpretation Act, 1889, art. 16 is to be read as providing that a director is to resign if requested in writing by his co-directors or co-director. The plaintiff was on September 4, 1930, requested in writing by his co-director to resign and in my judgment on that day he ceased by virtue of article 16 to be a director of the company. It follows that this action fails.

Solicitors: *Maude & Tunnicliffe, for Taylor, Simpson & Mosley, Derby*; *Peacock & Goddard, for Moody & Woolley, Derby.*

J. L. D.

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(1) (1878) 9 Ch. D. 610.

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[1930. B. 263.]

Bankruptcy—" Goods . . . . in the possession, order or disposition of the Bankrupt "—Hire-purchase Agreements—Assignment of Benefit of those Agreements—No Notice of Assignment before Bankruptcy of Trader—Sums becoming Due after Bankruptcy if Hiring continued—" Debts . . . . growing due to the bankrupt in the course of his trade or business "—Property divisible amongst Creditors—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

A trader carried on the business of selling and hiring out of pianos largely by means of hire-purchase agreements, by each of which the trader agreed to let on hire a piano, and in consideration the hirer agreed to pay the trader a sum of 4*l.* on the date of hiring and 1*l.* monthly so long as the hirer continued the hiring. The trader agreed that if the hirer should punctually pay him a specified total sum in these instalments, the piano was to become the absolute property of the hirer, but that until then it was to continue the trader's sole property. Early in 1930 the trader entered into a number of trader's agreements by which he agreed to deposit the hire-purchase agreements with the Gresham Guarantee Co., Ld., and on demand to assign to that company or its nominees the full benefit of those agreements, and in the meantime to hold them on trust for the Gresham Co. and its nominees. The Gresham Co. subsequently assigned the benefit of the trader's agreements to the plaintiff. No notice of the assignment was given until after the trader was adjudicated bankrupt on July 23, 1930:—

Held, that the monthly sums which, after the commencement of the bankruptcy, had or would become payable in advance under the hire-purchase agreements, if the hirer continued the hiring, were " debts . . . . growing due to the bankrupt in the course of his trade or business " within s. 38 (*c*) of the Bankruptcy Act, 1914, and were therefore properly divisible among the bankrupt's creditors as being things in action " at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner " within that section.

Decision of the Vice-Chancellor of the County Palatine Court of Lancaster reversed.

APPEAL from the Vice-Chancellor of the County Palatine Court of Lancaster.

Albert Levi Pendlebury (who was trading as A. L. Pendlebury & Co. and is hereafter referred to as " the bankrupt ")

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carried on the business of selling and hiring out pianos, and to a large extent the transactions were carried out by means of hire-purchase agreements, which so far as material were in the following form: A. L. Pendlebury & Co. (therein called " the owners ") agreed at the request of the hirer to let on hire to him a piano. In consideration thereof the hirer agreed (clause 1) to pay to the owners a sum of 4*l.* on the date of hiring and a sum of 1*l.* on the corresponding day of each succeeding month " so long as the hirer sees fit to continue the hiring " ; (clause 4) that if the hirer did not duly perform the agreement the owners might terminate the hiring; (clause 5) that if the hiring should be terminated by the hirer and the piano returned to the owners, the hirer should remain liable for arrears of hire. And the owners agreed (clause B) " that if the hirer shall punctually pay the full sum of 68*l.* 5*s.* by 4*l.* at the date of signing and by such monthly payments in advance as aforesaid the said instrument shall become the sole and absolute property of the hirer. Unless and until the full sum of 68*l.* 5*s.* be paid the instrument shall be and shall continue the sole property of the owners."

Between the dates of February 23, 1929, and February 10, 1930, the bankrupt entered into twenty-seven traders' agreements with the Gresham Guarantee Company, Ld. (hereinafter called " the company "). By each of these agreements, after reciting that A. L. Pendlebury & Co. (therein called " the traders ") had entered into the hire-purchase agreements specified in the schedule thereto, and had requested the company to grant them such financial facilities in connection with the same as are therein mentioned, it was agreed (so far as material) as follows :—

" 1. The traders will deposit with the company the hire-purchase agreements specified in the schedule hereto and will also on demand assign to the company or its nominees the full benefit of such agreements so far as the same are legally assignable."

" 2. Until such hire-purchase agreements shall be transferred to the company or its nominees the traders shall stand possessed of their rights under such agreements in trust for the company and its nominees."

"3. The chattels themselves which are the subject of the hire-purchase agreements are not intended to be assigned. . . . ."

"4. As and when the company makes advances against deposit of the said hire-purchase agreements the traders shall accept bills of exchange drawn by the company for the amount of such advance with the addition of discount charges as may be agreed between the parties to the agreement."

Pursuant to the traders' agreements the company from time to time made advances to the bankrupt, the method of business being that the company advanced two-thirds of the total cost of the pianos which were the subject-matter of the scheduled agreements, less 7½ per cent. upon the bankrupt's accepting twelve bills falling due in successive months for the total cost, and that at the end of eight months, if all the bills due down to that date had been met, the remainder of the cost, less 7½ per cent., was advanced against the remaining bills.

By an assignment dated March 18, 1930, after recitals that the World Auxiliary Insurance Corporation, Ld. (hereinafter called "the Corporation"), had issued to the company three indemnity policies relating to loans made to the company by Lloyds Bank, Ld., and that in each of the policies the company undertook, as and when required by the Corporation, to assign to the bank therein named all contractual rights under the said hire-purchase agreements, and also to do and concur in doing all things reasonably practicable to minimize loss thereunder, and that the Corporation was desirous of having the benefit of the traders' agreements vested in the plaintiff with a view to better securing the title of the Corporation, and had called upon the company to make the assignment, the company by the direction of the Corporation assigned to the plaintiff absolutely in trust for the Corporation the full benefit (inter alia) of the traders' agreements and the rights of the company thereunder respectively, and in particular the right to enforce the agreements on the part of the traders to assign to the company their contractual

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rights in the hire-purchase agreements specified in the respective schedules to the traders' agreements, so far as the same might be legally assignable, and also the full benefit of the trust in favour of the company declared in para. 2 of each of the traders' agreements.

A receiving order was made against the bankrupt on July 18, 1930, and on July 23, 1930, he was adjudicated bankrupt, the act of bankruptcy having taken place on June 24, 1930. The defendants were the trustees in bankruptcy of his property.

On September 24, 1930, the plaintiff gave notice to the defendants of the assignment of March 18, 1930, and on the same date gave notice requiring them to assign to him forthwith the benefit of the hire-purchase agreements, and to acknowledge that until such assignment the hire-purchase agreements were held in trust for him as assignee or nominee of the Corporation. He also required them to account for and pay to him all money already collected or received by them under the hire-purchase agreements, and to account for all money thereafter to be collected or received by them as money received in trust for him.

The trustees having failed to comply, the plaintiff commenced proceedings on September 30, 1930, claiming :—

(1.) A declaration that the plaintiff was entitled to have the benefit of the hire-purchase agreements, so far as the same were legally assignable, assigned to him as assignee or nominee of the company absolutely, or in the alternative by way of security for all money advanced by the company to the bankrupt, and that until the hire-purchase agreements should be transferred to the plaintiff they were held in trust for the plaintiff as such assignee or nominee absolutely or in the alternative by way of security.

(2.) An order for assignment of the hire-purchase agreements to the plaintiff, and if and so far as necessary specific performance of those agreements.

(3.) A declaration that all moneys already collected or received, or hereafter to be collected or received by the defendants under the hire-purchase agreements, were and would be held by them in trust for the plaintiff as such assignee or nominee; and

(4.) Payment to the plaintiff of all moneys so collected or received, and, if necessary, to have an account taken thereof.

The trustees counterclaimed to have the twenty-seven traders' agreements delivered up to them.

The Vice-Chancellor said that the main defence to the action was that the moneys payable under these hire-purchase agreements were debts due or growing due to the bankrupt in his trade or business at the date of the commencement of the bankruptcy, and that therefore they were "goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner," so as to be property divisible amongst his creditors under s. 38 of the Bankruptcy Act, 1914. The hire-purchase agreements were in the form discussed in *Helby* v. *Matthews* (1), when the House of Lords held that under that form there was no legal obligation to buy, and on that Mr. Atkinson said that the monthly payments payable under these agreements were not debts at all—neither debts due nor debts growing due. On the cases he was correct in that contention. They were not debts, but contingent claims, which might or might not end in becoming debts. It rested entirely with each hirer whether he would purchase the piano or not, and if he did not choose to continue the agreement and to retain the piano in his possession, he was not bound to pay any future instalments whatever. If that were so, it disposed of the claim of the trustees in bankruptcy under s. 38, and apart from that section it was clear that the benefits of these agreements were assigned to the company by the traders' agreements. It had been contended on behalf of the defendants that the benefit of these agreements was not assigned to the plaintiff. It was quite clear that the benefit could be assigned by the company, and in his view it had been assigned to the plaintiff in equity in such a sense that he was entitled to call upon the trustees to make a proper legal assignment to him.

(1) [1895] A. C. 471.

There would be a declaration that the plaintiff was entitled to have the benefit of the hire-purchase agreements assigned to him absolutely and an order for assignment accordingly. There would also be a declaration that all moneys already collected or received or hereafter to be collected or received by the defendants under the said hire-purchase agreements, except in so far as the sums were in respect of periods completed or in the course of completion on June 24, 1930, should be held by them in trust for the plaintiff, and he ordered an account.

The defendants appealed.

Sir Herbert Cunliffe K.C. and *W. Taylor* for the appellants. Sums that will become payable under the hire-purchase agreements in cases where the hirers decide to continue the hiring are property divisible amongst the bankrupt's creditors, as being goods at the commencement of the bankruptcy " in the possession, order or disposition of the bankrupt, in his trade or business " within s. 38 (*c*) of the Bankruptcy Act, 1914. This is so, because before the bankruptcy no notice of the assignment was given to the hirers. By the proviso to s. 38 (*c*) " things in action other than debts due or growing due to the bankrupt in the course of his trade or business " are not to be deemed goods within the meaning of the section ; but it is contended that the money in question consists of " debts . . . . growing due to the bankrupt in the course of his trade or business." If this were not so, the bankrupt would have been left as the reputed owner of valuable assets on which he could get considerable credit, but which would not be assets in the bankruptcy. The Vice-Chancellor has construed " debts . . . . growing due " as meaning debts due, but payable at a future date. In *Ex parte Kemp* (1) the expression " debts due " in the corresponding proviso in s. 15, sub-s. 5, of the Bankruptcy Act, 1869, was held to include debts due, but payable at a future date, but not to include debts which were only contingent at the commencement of the bankruptcy. The Bankruptcy Act, 1883, s. 44, had the added words "or growing due," which now appear in the Act of 1914. These added words must have been intended to cover something not within the previous section, and the reasonable inference is that they were inserted in view of the decision in *Ex parte Kemp* (1) to cover debts which were contingent at the commencement of the bankruptcy.

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(1) (1874) L. R. 9 Ch. 383.

If however the Court takes a contrary view, s. 43 of the Act of 1914 deprives the plaintiff of any right to the future sums becoming due under the hire-purchase agreements, as the assignments under which the plaintiff claims were not registered. The proviso to that section has no application on the view that contingent debts are not "debts growing due."

Cyril Atkinson K.C. and *Allan Walmsley* for the respondent. The last point was not raised in the Court below, but the answer to it is that s. 43 does not relate to specific assignments of book debts, but only to general assignments. The section applies only to an assignment of the whole of the book debts or of a particular class of book debts, such as, for example, an assignment of all book debts becoming due under hire-purchase agreements.

[ROMER L.J. If so, the proviso was unnecessary.]

It was doubtless inserted by way of caution, but in any case, if the meaning of the body of the section is clear, the proviso should not be used to alter it: *West Derby Union* v. *Metropolitan Life Assurance Society.* (2) In *In re Isaacson* (3) there was an assignment of a piano and the benefit of the hire-purchase agreement in respect of it. The assignment of the piano was held bad for want of registration, but not the assignment of the benefit of the hire-purchase agreement. Such an assignment is not an assignment of a debt, but of a contractual right.

On the question arising under s. 38 (*c*) it is material to see the history of this particular piece of legislation. Under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict.

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(1) L. R. 9 Ch. 383.

(2) [1897] A. C. 647, 655.

(3) [1895] 1 Q. B. 333.

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c. 106), s. 125, the reputed ownership provision applied to "any goods or chattels." It was held however that a contingent interest in a sum of money was a chattel: *North* v. *Gurney.* (1) The Act of 1869 introduced the limitation that choses in action were not to be within the provision unless they were "debts due." That expression was construed by Mellish L.J. in *Ex parte Kemp* (2) as including debts due, but not presently payable. The Act of 1883, by inserting the words "growing due," gave effect to that construction. A debt implies a legal obligation to pay, and the words "due or growing due" can only refer to the date for payment. Take the case of a weekly tenancy. Can it be reasonably suggested that rent which would become due in 1932 or 1933, if the tenancy continued so long, is a debt growing due? If not, then *Helby* v. *Matthews* (3) becomes of importance, as showing that in a hire-purchase agreement of the form adopted here, there is no legal obligation to pay in the future. That obligation only arises if the hirer, when the time comes, continues his hiring. Further, property held in trust for a beneficiary does not pass to the trustee in bankruptcy except so far as it is covered by s. 38 (*c*).

Sir Herbert Cunliffe K.C. in replying referred to *Ex parte Union Bank of Manchester.* (4)

Cur. adv. vult.

June 8, 1931. Their Lordships read the following judgments:—

LORD HANWORTH M.R. This is an appeal from a decision of the Vice-Chancellor given on February 5, 1931, whereby he made the declaration asked for by the plaintiff in the statement of claim. The facts are fully stated by the learned Vice-Chancellor, and it is unnecessary to repeat them.

The question to be determined is whether the interests of the Gresham Company in the hire-purchase agreements, entered into between the bankrupt and a number of his

(1) (1861) 1 J. & H. 509.
(2) L. R. 9 Ch. 383.
(3) [1895] A. C. 471, 478, 480, 481.
(4) (1871) L. R. 12 Eq. 354.

customers, of which interests the plaintiff is the assignee, have passed to the plaintiff, or whether they fall within s. 38 (*c*) of the Bankruptcy Act, 1914, and are part of the bankrupt's property divisible among his creditors.

The words in the sub-section which it is argued intercept the interests are those of the proviso: "Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

Do the words, "debts due or growing due," bring back these interests so as to include them in the goods of the bankrupt in the order or disposition of the bankrupt in his trade or business?

It has been decided in *Helby* v. *Matthews* (1) that a hiring agreement drawn in the form, which was in substance the form used by the bankrupt in his business, does not involve or contain any legal obligation on the part of the hirer to buy the goods lent to him, and there is no agreement to buy. The hirer has an option either to return the goods or to pay in advance for the time he keeps them in his possession, with a right to terminate the hiring and option at any time. As Lord Herschell said (2): "I cannot think that an agreement to buy, 'if he does not change his mind,' is any agreement to buy at all in the eye of the law." If there is no agreement in law, there is no debt due or accruing due, for the payments are to be made in advance if the hiring is to be continued.

It was held by Mellish L.J. in *Ex parte Kemp* (3) that so-called debts which were only contingent at the commencement of the bankruptcy do not fall within the expression debts due to the bankrupt in the course of his business within s. 15, sub-s. 5, of the Bankruptcy Act, 1869, which was the Act then in force and which the Lord Justice had to interpret. It is largely upon the principle embodied in this case that the Vice-Chancellor based his judgment, and the case must, therefore, be examined with care.

It will be observed that the terms of sub-s. 5 of s. 15 are not the same as those of s. 38 (*c*) of the Act of 1914, with which

(1) [1895] A. C. 471.
(2) [1895] A. C. 476.
(3) L. R. 9 Ch. 383.

we have to deal. "Other than debts due to him in the course of his trade or business" were its words. There was no addition of "or growing due." Those words were first inserted in the corresponding section, s. 44 of the Bankruptcy Act, 1883. Mellish L.J. in the course of his judgment said (1): "It is impossible that acceptances payable *in futuro*, or bills of exchange receivable *in futuro*, were intended to be excluded from the list of debts due to or by a bankrupt."

Thus the judgment must be based on the fact that the debts in that case were contingent only. It was uncertain whether they would mature into debts at all. But so-called "debts" payable in futuro were in the opinion of the Lord Justice within the narrower terms of the then Bankruptcy Act. See also his words (2) where he points out that the section is intended to apply to the ordinary course of business of traders who are often compelled to give long terms of credit to their debtors, and that this being known to their creditors procures them credit also, the result being that a debt, although its due date for payment is postponed, must be treated as within the term "debts due in the course of his trade or business."

The present Bankruptcy Act maintains the phrase as altered by the Act of 1883, and some additional effect beyond that attributed by Mellish L.J. to "debts due to him in the course of his trade or business" must belong to the words "growing due." They are not required to cover a debt "debitum in praesenti solvendum in futuro."

The word "debt" seems to connote a contractual liability as between debtor and creditor, but "growing due" is not an apt expression to cover a debt which is already a contractual obligation though the due date for payment has not yet been reached. It seems to intend something that in the course of the trade or business will ripen into a debt, though not a debt, and only in an inchoate state at the commencement of the bankruptcy. If this be the true interpretation of s. 38 (*c*), it would seem that, although under the hiring agreement there was no engagement to hire for any particular time and payment was to be made in advance for each continuation of the hiring,

(1) L. R. 9 Ch. 388.

(2) L. R. 9 Ch. 390.

yet there was a relation between the bankrupt and the hirer out of which a debt might grow.

In *Tailby* v. *Official Receiver* (1) the House of Lords held that an assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined, and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business.

Lord Herschell states the question decided in the case to be this (2): "Whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid." The word "debt" is thus used not of an existing contractual liability but of something which is to mature in the future, and which "on its coming into existence . . . . shall answer the description in the assignment, or, in other words, ... shall be capable of being identified as the thing, or as one of the very things assigned." (3)

In *In re Davis* (4) Cave J. held that debts due under a hire-purchase agreement which had been assigned, but of which no notice had been given to the hirer, were in the order or disposition of the bankrupt.

It is said that in the present case there was no assignment of debts of any kind, because there were no debts properly so called accruing due under the hiring agreement, for there was no engagement on the part of the hirer to continue the hiring, and it was only continued, if and when the payment of the hire or rent due had been made in advance—that the assignment therefore was only of the contractual and proprietary right independently of the subject-matter of the hiring agreements—rights which are separate from the piano, as in *In re Isaacson*. (5)

This argument appears to give too narrow a construction to the sub-section, and to overlook the commercial sense attributable to the words we have to construe, as demonstrated in *Tailby* v. *Official Receiver*. (1)

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(1) 13 App. Cas. 523.
(2) Ibid. 527.
(3) 13 App. Cas. 533.
(4) (1888) 60 L. T. 157.
(5) [1895] 1 Q. B. 333.

The opinion that I have expressed renders it unnecessary to consider the questions argued upon s. 43.

The appeal must be allowed with costs here and below and the order of the Vice-Chancellor must be discharged. In lieu thereof an order must be made upon the counterclaim for delivery up of the trader's agreements referred to in paragraph 1 of the statement of claim to the trustees.

Lawrence L.J. The first and main question in this appeal is whether the monthly payments becoming due and payable after the commencement of the bankruptcy under certain hire-purchase agreements entered into before the bankruptcy were debts growing due to the bankrupt in the course of his trade or business at the commencement of the bankruptcy within the meaning of s. 38 of the Bankruptcy Act, 1914.

The bankrupt was a piano dealer, and in the course of his business entered into numerous hire-purchase agreements with his customers. Under each of these agreements (which were all in the same form) the bankrupt agreed to let on hire to the hirer a specified piano and the hirer agreed (inter alia) to pay to the bankrupt a sum of 4*l.* down and thereafter a sum of 1*l.* per month in advance so long as the hirer saw fit to continue the hiring, and the bankrupt agreed that if the hirer should punctually pay the sum of 68*l.* 5*s.* in manner aforesaid the piano should become the property of the hirer but that, unless and until the full sum of 68*l.* 5*s.* had been paid, the piano should be and continue to be the sole property of the bankrupt.

The present case is concerned with the hire of 1*l.* per month payable after the commencement of the bankruptcy under such of the hire-purchase agreements as were current at that date.

The bankrupt deposited about 200 of his hire-purchase agreements with the Gresham Guarantee Company to secure advances made to him by that company, and entered into twenty-seven covering agreements (therein and hereafter called "traders' agreements"). These traders' agreements were all in the same form, and by each of them the bankrupt agreed to deposit with the company certain specified hire-purchase agreements and to assign to the company or its nominees the full benefit of such agreements so far as the same were legally assignable, and further agreed that, until such agreements should be transferred to the company or its nominees, he should stand possessed of his rights thereunder in trust for the company. Each of the traders' agreements contained a provision that the chattels the subject-matter of the hire-purchase agreements were not intended to be assigned, but the ownership thereof should remain in the bankrupt until the hirer had exercised his option of purchase.

On March 18, 1930, the Gresham Guarantee Company assigned to the plaintiff the full benefit of the twenty-seven traders' agreements and the rights of the Gresham Guarantee Company thereunder.

Neither the Gresham Guarantee Company nor the plaintiff gave notice of the traders' agreements or of the assignment of March 18, 1930, to the hirers of the pianos, and it is not disputed that all sums which had become due and payable under the hire-purchase agreements before the commencement of the bankruptcy (as well as all monthly sums thereafter to become due and payable thereunder if such last mentioned sums should be held to be debts growing due to the bankrupt in the course of his trade or business within the meaning of s. 38) were at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof.

The learned Vice-Chancellor held that as under the hire-purchase agreements there was no legal obligation to buy the pianos (*Helby* v. *Matthews* (1)), and as the hiring could be determined at any time, the agreement to pay the monthly hire of 1*l.* only created contingent claims, and consequently that all sums becoming due and payable in respect of hire after the commencement of the bankruptcy were neither debts due nor debts growing due within s. 38 (*c*). This decision was based upon the judgment of Mellish L.J. in *Ex parte Kemp.* (1) In that case (which was decided when the Bankruptcy Act, 1869, was in force) it was held that although the expression " debts due " in s. 15, sub-s. 5, of the 1869 Act was not confined to debts presently payable, yet it did not include debts which were only contingent at the commencement of the bankruptcy, such as the moneys retained by bankers against acceptances for which they had given marginal notes. In the Bankruptcy Act, 1883, the expression " debts due, etc.," was expanded into " debts due and growing due, etc.," and this latter expression was repeated in s. 38 of the 1914 Act.

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(1) [1895] A. C. 471.

The Vice-Chancellor has in my judgment given too narrow a meaning to the words " growing due " added by the Legislature since *Ex parte Kemp* (1) was decided.

If, as the Vice-Chancellor has held, these added words were limited to debts due but not presently payable, their insertion in the subsequent Acts would not have effected any expansion of the previous expression " debts due " as interpreted by the Court and would have rendered their addition otiose.

In my judgment the words " growing due " were added by the Legislature to meet such cases as *Ex parte Kemp* (1) and the present case, and the added words ought not to be construed so as to exclude the monthly hire becoming due under the hire-purchase agreements after the commencement of the bankruptcy.

All the monthly payments in question became and will become due and payable under agreements entered into by the bankrupt in the ordinary course of his business before the commencement of his bankruptcy. Each agreement, although determinable by the hirer at any time, created at the time it was entered into an obligation on the part of the hirer to make the monthly payments thereunder so long as he retained the piano and did not put an end to the agreement. Therefore all payments becoming due and payable after the commencement of the bankruptcy under an agreement in force at the date of the commencement of the bankruptcy may properly be termed debts "growing due" to the bankrupt within the meaning of s. 38 (*c*). Such debts when they mature could only be recovered under the agreement out of which they may be said to have grown. The fact that some of the payments covered by the agreement may never ripen into debts does not in my opinion prevent those which do eventually so ripen from being debts which have grown due to the bankrupt in the course of his business. All the monthly payments under the hire-purchase agreements come directly within the mischief aimed at by s. 38 (*c*) of the Act of 1914; they are payments which a trader in good credit does not usually pledge or part with and are therefore very likely to procure the bankrupt credit from the manufacturers of the pianos which he purchases and from other persons: see *Ex parte Kemp.* (1) In these circumstances I am of opinion that such payments are included in the expression of "debts . . . . growing due," etc., in s. 38.

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(1) L. R. 9 Ch. 383.

I am confirmed in this view by the use of the expression "debts growing due under specified contracts" in the proviso to s. 43 and of the expression "book debts . . . . growing due" in s. 55, sub-s. 1, in both of which sections I think it is fairly plain that those expressions were intended to cover such payments as the monthly hire becoming due and payable under the hire-purchase agreements in the present case.

Having reached the conclusion that the appellants are right on their first and main contention, it becomes unnecessary to consider their second point under s. 43, upon which I prefer not to express any opinion.

I agree, therefore, that this appeal succeeds, with the consequences indicated by the Master of the Rolls.

ROMER L.J. At the commencement of Pendlebury's bankruptcy his right to receive the monthly sums thereafter payable in advance under each hire-purchase agreement so long as the hirer should see fit to continue the hiring was a thing in action which must be deemed to have been in his possession, order or disposition, in his trade or business, by the consent and permission of the true owner. For Pendlebury had by the trade agreements agreed to assign to the plaintiff's assignors the full benefit of the hire-purchase agreements, and neither the plaintiff nor his assignors had given notice of their equitable title to the sums in question. But such things in action are not goods within the meaning of s. 38 (*c*) of the Bankruptcy Act unless they are "debts due or growing due to the bankrupt in the course of his trade or business." The learned Vice-Chancellor held that they were not debts at all, being neither due nor payable at the commencement of the bankruptcy. That they were not at that date debts properly so called must of course be conceded. It is also quite clear that they were not then due. The question to be decided on this appeal, however, is whether they were not "debts . . . . growing due" within the meaning of the section.

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(1) L. R. 9 Ch. 383, 389.

In order to construe the section, it is, I think, permissible to consider the mischief that the Legislature had in view when enacting it. Now under s. 15, sub-s. 5, of the Bankruptcy Act, 1869, the only things in action that could be deemed goods and chattels for the purposes of the sub-section were debts due to the bankrupt in the course of his trade or business. The meaning to be attributed to these words was considered by Mellish L.J. in the case of *Ex parte Kemp*. (1) He held that the words covered, not only debts presently payable but debts that, though presently due, were not payable until a future date. But he held further that the words did not include sums that might never become payable at all. Such sums, he said, were not debts properly speaking. That the Lord Justice put the proper construction upon the words of the section no one, so far as I know, has ever doubted. But it is permissible to doubt whether the Legislature would have excluded such sums from the order and disposition section had its attention been drawn to the matter. Where, as in the present case, a trader having the practically, though not legally, certain prospect of receiving large sums in the future, assigns such sums to another, but is allowed by this third party to remain in ostensible possession of them, it is just as probable that credit will be given to the trader on the strength of such possession as would be done if the sums were legally due though not immediately payable. Now in the present Act (as in the Act of 1883) the Legislature has added the words "or growing due." There must have been some good reason for this. *Ex parte Kemp* (1) was decided in the year 1874, and it was quite unnecessary to add the words "or growing due" for the purpose of giving in 1883 legislative affirmation of the correctness of Mellish L.J.'s decision. Nor would the words be those that one would expect to be chosen for the purpose if that had been the Legislature's intention. The Lord Justice had held that the exception to the proviso to s. 15, sub-s. 5, of the Act of 1869 did not include merely debts presently payable, but included also those payable in the future. If all that was intended by the alteration was to make this more clear, I should have expected the Legislature to substitute for the phrase "debts due" the phrase "debts payable or growing payable." For myself, I prefer to think that the new phrase was intended to include something that was not included in the old one, and that the words "or growing due" bring within the exception to the proviso sums which are payable on a contingency, that is to say, sums that are not at present debts at all, but which in a certain contingency may grow into debts. Such a use of the word "debts" is not uncommon in bankruptcy legislation. In s. 30, sub-s. 3, the phrase "all debts and liabilities, present or future, certain or contingent" is used. In s. 43, sub-s. 1, too, is to be found the expression "existing or future book debts." The ambit of this last mentioned sub-section was a matter of argument before us, but does not need to be decided in the view that I take of s. 38. It is, however, to be observed that there is some ground for thinking that the phrase in the proviso to the sub-section "debts growing due under specified contracts" would include not only debts properly so called, but also what

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are called in the sub-section "future debts." But, whether this be so or not, I am of opinion that the sums which we have to deal with in the present case were "debts growing due" at the commencement of Pendlebury's bankruptcy, and that this appeal should be allowed with the consequences indicated by the Master of the Rolls.

Appeal allowed.

Solicitors: *Vizard, Oldham, Crowder & Cash, for William Furness, Manchester; Linklaters & Paines, for James Chapman & Co., Manchester.*

H. C. G.

EVE J.
1931
May 19, 20, 21; *June* 2, 23.

In re WINGATE'S PATENT.

[1931. W. 1098.]

Patent—Practice—Application for Grant—Opposition—Second Application—Division of Patent—Invention excluded by Amendment from earlier Specification—Jurisdiction of Comptroller-General—Ultra vires—Appeal to Law Officer—Motion for Writ of Prohibition—Patents and Designs Act, 1907 *and* 1919 (7 *Edw.* 7, *c.* 29; 9 *&* 10 *Geo.* 5, *c.* 80), *ss.* 11, 13, 14, 21, 74 *—Patents Rules,* 1920, *r.* 13*—Crown Office Rules, r.* 70.

On October 26, 1928, W. lodged an application and provisional specification for a patent for improvements in folding spectacles. The complete specification was lodged in July, and accepted in December, 1929, as No. 322,297. In February, 1930, notice of opposition was given by E. and the T. Optical Company. In April, 1930, W. lodged another application with a complete specification, differing only from No. 322,297 in the claims, which were fewer in number, but widened by the omission of certain limiting words. This specification was accepted on April 28, 1930, as No. 328,584. W. then made an application for a division of the patent under r. 13 of the Patents Rules, and the Comptroller allowed it, holding that No. 328,584 should be treated as an application for a patent for an invention excluded by amendment from specification No. 322,297, and should bear date October 26, 1928. The opponents, contending that the Comptroller could not divide or antedate the application, and that his decision, in the circumstances, was ultra vires the Patents and Designs Act and the rules thereunder, moved for a writ of prohibition to restrain the Comptroller and W. from proceeding with application No. 328,584:—

Held, that the decision of the Comptroller being in a matter of the administration of the Patent Office and the procedure in granting a patent, was final, subject to an appeal to the Law Officer under the Act, and to directions which might be given by the officer under s. 74, and that prohibition would not lie against the Comptroller or the Law Officer in respect of any act or decision so done or made.

The division or antedating of an application for a patent provisionally decided by the Comptroller before opponents have been heard is a matter which can be reopened and the decisions thereon reviewed in opposition proceedings, according to long established practice in the Patent Office, notwithstanding that such questions are not specifically included in the grounds of opposition enumerated in s. 11 of the Act.

In re Stromberg Motor Devices Co.'s Application (1922) 40 R. P. C. 405 applied on the latter point.

MOTION FOR PROHIBITION.

The Tunstall Optical Company, Ld., and William David Eglinton, of Addiscombe Road, Croydon, moved for the issue of a writ of prohibition directed to the Comptroller-General of Patents and Gerald Henry Wingate, of 15, Wigmore Street, London, to prohibit them from further proceeding with an application for letters patent No. 328,584, wherein G. H. Wingate was the applicant, upon the ground that the Comptroller-General had no jurisdiction to hear or determine the said application as of the said date.

On October 26, 1928, an application and provisional specification for a patent for improvements in folding spectacles was lodged at the Patent Office by G. H. Wingate, of Messrs. Hamblin & Co., Ld., opticians. The complete specification was lodged on July 26, 1929, and accepted and published on December 5, 1929, under No. 322,297. On February 11, 1930, W. D. Eglinton and the Tunstall Optical Company, Ld., gave notice of opposition on various grounds, including one that the complete specification was the subject of applications made by the opponents between October, 1928, and July, 1929. On April 12, 1930, G. H. Wingate lodged another application together with a complete specification, the language in the body of which was substantially identical with the previous specification, but the claims made were reduced in number, and by the omission of certain words, wider than the claims of the original specification. It was alleged that the opponents were making and selling folding spectacles of a pattern which would be an infringement of the later, but not of the earlier specification. The second specification was accepted on April 28, 1930, under No. 328,584. The applicant, on the advice of his agents, made an application for a divided patent under r. 13 of the Patent Rules, 1920. The Deputy-Comptroller, after hearing arguments and consulting the Comptroller-General, allowed the application, and decided that it should be treated as one for an invention excluded by amendment from specification No. 322,297 and made on October 26, 1928.

On July 14, 1930, the opponents gave notice of opposition to No. 328,584 upon grounds similar to those of their previous opposition, and intimated that they would contend that the date claimed for the second application—namely, October 26, 1928, had been allowed ultra vires the Act, that the application should be dated April 12, 1930, and that the specification was, on these grounds, misleading.

On the motion evidence was filed by the opponents of the patent, that before the decision of the Comptroller to antedate the patent there had been no amendment of No. 322,297, and in particular that the subject-matter of No. 328,584 had not been excluded by amendment from No. 322,297 and had never been contained therein.

The applicant G. H. Wingate filed evidence intimating that he was willing to amend No. 322,297 by inserting a disclaimer, but that no such amendment could be made so long as the patent was under opposition. The Comptroller-General also filed an affidavit stating that his decision was in accordance with the practice of the Patent Office for twenty years past, but that he had now applied under s. 74 of the Patents and Designs Act, 1907 and 1919 (1), to the Law Officer for directions. The Solicitor-General proposed to defer giving any directions until the motion had been disposed of.

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(1) Patents and Designs Act, 1907 and 1919, s. 13: "Except as otherwise expressly provided by this Act, a patent shall be dated and sealed as of the date of the application: Provided that no proceedings shall be taken in respect of an infringement committed before the acceptance of the complete specification."

Sect. 74: "The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to a law officer for directions in the matter."

Sect. 93: "In this Act, unless the context otherwise requires, 'Law officer' means the Attorney-General or Solicitor-General for England."

The opponents now moved for a writ of prohibition.

James Whitehead K.C. and *J. Mould* for the applicants. The application is for a writ of prohibition against the Comptroller-General of Patents to restrain him from granting an application for a divided patent under r. 13 of the Patents Rules, 1920. Under that rule the initial specification may be amended, and the invention divided into two, and each invention made the subject of a separate application. The present applicant contends that here there was only one invention, that it could not be divided into two, that there has been no amendment of the initial specification, and that the Comptroller-General had no jurisdiction or authority to grant the patent in this form, as of the date of the earlier specification.

Patents Rules, 1920, r. 13: "(1.) When a specification contains several distinct matters, they shall not be deemed to constitute one invention by reason only that they are all applicable to or may form parts of an existing machine apparatus or process."

"Where a person making application for a patent has included in his specification more than one invention, the Comptroller may require or allow him to amend such application and specification and drawings or any of them so as to apply to one invention only, and the applicant may make application for a separate patent for any invention excluded by such amendment.

"Every such last application may, if the Comptroller at any time so direct, bear the date of the original application, or such date between the date of the original application and the date of the application in question, as the Comptroller may direct, and shall otherwise be proceeded with as a substantive application in the manner prescribed by the Acts and by these rules.

"Where the Comptroller has required or allowed any application or drawings or any of them to be amended as aforesaid, such application shall, if the Comptroller at any time so direct, bear such date, subsequent to the original date of the application, and not later than the date when the amendment was made, as the Comptroller shall consider reasonably necessary to give sufficient time for the subsequent procedure relating to such application.

"(2.) Where the same applicant has put in two or more provisional specifications for inventions which he believes to be cognate or modifications one of the other, and the Comptroller is of opinion that such inventions are not cognate or modifications one of the other, the applicant may divide the complete specification left in connection with his application into such number of complete specifications as may be necessary to enable the application to be proceeded with as two or more separate applications for patents for different inventions."

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Sir Arthur Colefax K.C. and *Stafford Crossman* for the Comptroller-General. We take the preliminary objection that the writ of prohibition will not lie. This is a matter for the decision of the Comptroller, and the only appeal from his decision is to a Law Officer of the Crown: Patents and Designs Act, 1907 and 1919, ss. 6, 7, 8 and 21. Under s. 74 the Comptroller may, in any case of doubt or difficulty arising in the administration of the Act, apply to a Law Officer for his directions. In all questions relating to the grant or the withholding of the grant of a patent the ultimate court of appeal is the Law Officer: *Reg.* v. *Comptroller-General of Patents. Ex parte Tomlinson* (1), per A. L. Smith L.J.; *Rex* v. *Comptroller-General of Patents. Ex parte Muntz.* (2)

Whitehead K.C. The conditions precedent to the application of r. 13 are not to be found in the present case. There was only one invention, and not two. The claims made in the subsequent specification are wider than those in the specification originally accepted. Rule 13 is only applicable before the acceptance of the provisional specification.

The fixing of a date for the application cannot be reviewed or appealed against under s. 11 of the Patents Act, 1907, as amended by s. 14 of the Patents Act, 1919, and it is not one of the grounds of opposition to the grant enumerated in that section.

The power of the Comptroller under s. 74 to refer matters of doubt or difficulty to the Law Officer for his directions refers to administrative rather than judicial acts. In this case the Comptroller has asked the directions of the Law Officer, as he states in his affidavit, but we do not know what directions he has asked for. In any case the Law Officer is bound by the rules not to decide anything contrary to them. Whether the Comptroller has purported to act under r. 13, or otherwise, he has clearly exceeded his jurisdiction.

Trevor Watson K.C. and *Basil Drewe* for the respondent Wingate. Two questions arise here: (1.) Can proceedings for a writ of prohibition be brought at all ? and (2.) assuming

(1) [1899] 1 Q. B. 909, 914, 915.

(2) (1922) 39 R. P. C. 335.

they can be brought, ought they to succeed ? It is submitted that no prohibition proceedings in a case of this kind will lie in the Chancery Division. This depends upon the Judicature Act, 1873, and the Crown Office Rules, 1906. Before that Act a writ of prohibition could be obtained in any Court, though normally the King's Bench Division was the proper tribunal to issue it: see Short and Mellor: Practice of the Crown Office, pp. 263–266. The power of the Chancery Division to issue a writ of prohibition is limited by r. 70 of the Crown Office Rules, which orders that in all matters on the Crown side the application shall be made to a Divisional Court.

This is plainly a Crown matter, for the Comptroller is executing the office formerly held by the Law Officer, and advising the Crown as to the exercise of the Royal Prerogative, subject to the special provisions of the Statute of Monopolies.

The present case is essentially one between the Crown and the subject, though the exercise of the Royal Prerogative may affect the rights of third parties : *The Recepta.* (1)

The next question is : is the Comptroller acting as a Court in the proceedings now in question ? He is partly an executive and partly a judicial officer. Down to the time when the patent is granted all the proceedings are between the Comptroller as an executive officer and the party seeking the grant of a patent. It does not follow, because there is a right of appeal in certain cases to the Law Officer, that that officer is acting as a Court or a judge or otherwise than as an executive officer.

Under s. 14 of the Patents Act, 1907, a patent is to be granted for one invention only, but it is not competent for any person in any action or other proceeding to take the objection that a patent has been granted for more than one invention. If the Comptroller decides that the specification contains more than one invention, there is no express provision for an appeal from his decision. The decision is one of an executive character, for on it depends the question what fees are to be paid by the applicant. It is not a decision pursuant to any judicial proceeding, and therefore no prohibition will lie: *In re Van Gelder's Patent* (1); *Martin* v. *Mackonochie* (2), per Thesiger L.J. On the authorities there is no record reported of either the Comptroller-General or the Attorney-General ever having a writ of prohibition served upon them under the Patents Acts.

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(1) [1893] P. 255.

But assuming that prohibition will lie at all, it cannot lie while there is pending an application to the Law Officer for directions under s. 74. The fact that the directions of the Law Officer had been sought was treated as conclusive in *Reg.* v. *Comptroller-General of Patents. Ex parte Tomlinson.* (3) There is a right of appeal, quite distinct from the right to seek directions, to the Law Officer on many grounds under the Act.

The Court will not interfere by prohibition until it knows what directions are being given by the Law Officer: *Ex parte Simon.* (4)

Finally, even if prohibition lies at all, no proceedings for the writ can be brought while there is opposition pending. The respondent has put in an application which cannot be disposed of until the opposition has been heard. A writ of prohibition if granted takes effect at once, and cannot be adjourned.

The present applicants cannot at one and the same time pursue the remedy of opposition on the ground that the Comptroller has acted ultra vires and move for a writ of prohibition against him. It is not sought as a mere alternative remedy.

On the merits, we desire the question whether prohibition lies to be decided first. We do not agree with the contention of the Crown that this is a matter which can be raised in opposition proceedings.

Sir Arthur Colefax K.C. and *Stafford Crossman.* We do not take the point that the Court has no jurisdiction to order the issue of a writ of prohibition. But it will not lie against the Comptroller, because he is the statutory authority from whom there is no appeal, except to the Law Officer. It is not to be assumed that he has acted under r. 13. The Comptroller sends the application to an examiner to report upon, but he is not bound by the examiner's report. The Comptroller has power to review his own decision: *In re Stromberg Motor Devices Co.'s Application.* (1)

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(1) (1888) 6 R. P. C. 22, 25.
(2) (1879) 4 Q. B. D. 697, 732.
(3) [1899] 1 Q. B. 909.
(4) (1888) 4 Times L. R. 754.

[*Whitehead K.C.* I complain that here he has reversed his decision.]

Ever since the Patents Act, 1883, it has been the practice for the Comptroller and the Law Officer in opposition proceedings under s. 11 to deal with any question which raised a doubt as to the regularity of the proceedings: *In re Hughes' and Kennaugh's Application.* (2) This case can properly be dealt with by the Law Officer in opposition proceedings. There is therefore no basis for this application.

Whitehead K.C. in reply. There is still jurisdiction in the Chancery Division to deal with matters of prohibition, notwithstanding anything in the Crown Office Rules: see Annual Practice, p. 1391. Patent cases were never part of the exclusive jurisdiction of the Chancery Division. The old procedure by writ of scire facias for avoiding and cancelling a patent was taken "on the common law side of the Court of Chancery, being the Court in which the patent was made": Hindmarch on Patents (1846), pp. 379, 380. It is part of the inherent jurisdiction of the Lord Chancellor. The Crown Office Rules simply determine the province and procedure of the Crown Office, and do not affect the Chancery jurisdiction.

But assuming we are wrong on this point and the sole jurisdiction is in the King's Bench Division, the Court has power to send the case back to that Division. Secondly, it is said that the Comptroller is not an inferior court, and that he acted in an executive and not a judicial capacity. But prohibition, like other Crown writs such as certiorari, is not limited to the acts of persons or bodies that are ordinarily considered to be Courts: *Rex* v. *Woodhouse*, per Fletcher

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(1) 40 R. P. C. 405, 411.

(2) (1910) 27 R. P. C. 281.

Moulton L.J. (1); *Rex* v. *Electricity Commissioners* (2) per Bankes and Atkin L.JJ. The appeal to the Law Officer is provided in the case of a refusal by the Comptroller to grant an application: s. 73. Here the applicant was Mr. Wingate, and his application, giving him a date and a decision, was granted.

There are many matters with which the Patent Office deals where the Patents Acts do not expressly provide a right of appeal to the Law Officer. In practice the Office often grants one even where there is no authority for so doing.

No application for directions under s. 74 was pending when prohibition proceedings were commenced. The application was only made after and in consequence of the motion.

The Comptroller cannot take directions from the Law Officer as to whether any previous action of his, as in fixing the date in this case, was right or not; if, however, s. 74 enables him to do so we are willing to take the risk.

There is no ground for the application of r. 13 of the Patents Rules, 1920, for two necessary conditions have not been complied with: (1.) there never was included more than one invention in the specification; (2.) nothing has been excluded from the first one. On the fourth point, it is no objection to the motion that opposition proceedings are pending.

As to *Tomlinson's* case (3) and *Muntz's* case (4) neither of these are authorities in the present one. The first was an application for a writ of mandamus to allow a member of the public to oppose a patent. There the person intervening had no interest in the subject-matter. The mandamus asked for was a discretionary writ, and the Court refused to exercise its discretion. Here the writ of prohibition is asked for by an interested party, because it is said that the Comptroller has exceeded his jurisdiction, and done something outside the limits of the Patents Acts.

Muntz's case (4) decides that in the event of an adverse decision by the Comptroller against the applicant for a patent,

(1) [1906] 2 K. B. 501, 535.
(2) [1924] 1 K. B. 171, 190, 205.
(3) [1899] 1 Q. B. 909.
(4) 39 R. R. C. 335.

the appeal is to the Law Officer; but here the Comptroller has granted a patent as of a certain date, which in the circumstances he had no jurisdiction to do. The Comptroller has not merely given a decision in favour of one person, or against another: he has gone outside the Act altogether.

Cur. adv. vult.

June 23. EVE J. The circumstances in which this motion for a writ of prohibition to prohibit the respondents from further proceeding in the matter of an application for Letters Patent numbered 328,584 as of date October 26, 1928, has been launched are as follows:—

The moving parties and the respondent Wingate are interested in various patents and applications for patents relating to improvements in folding spectacles. On October 26, 1928, Wingate lodged an application for one such grant, No. 31,150 of 1928. The provisional specification was left with the application, the complete was left on July 26, and accepted on December 5, 1929, under number 322,297. On February 11, 1930, William David Eglinton, one of the parties moving for the writ, gave notice of his intention to oppose the grant on various grounds, including one that the complete specification described and claims an invention other than that described in the provisional specification, and that such other invention forms the subject of applications made by the opponents in the interval between the leaving of the provisional specification and the leaving of the complete specification.

On April 12, 1930, Wingate lodged another application, No. 11,670 of 1930. The provisional specification is dated April 11, 1930, and was left with the application, and the complete, also dated April 11, 1930, but stated to have been left on July 26, 1929, was accepted on April 28, 1930, under number 328,584. These particulars appear on the King's Printers' copy of the specification, as also the fact that the application is treated as one for an invention excluded from or divided out of application No. 322,297. At the end of the complete specification, which down to that point is a reprint of the specification left on July 26, 1929, under the application for the parent patent the following paragraph is inserted: "It is to be understood that I make no claim to the invention claimed in any patent granted pursuant to my co-pending application No. 322,297."

The decision that the application was proper to be treated as one for an invention excluded by amendment from specification No. 322,297, and made on October 26, 1928, and not on April 12, 1930, was given by the Deputy Comptroller on April 23, 1930, after hearing arguments on behalf of the applicant on the 22nd and consulting the Comptroller-General. This decision was notified to Mr. Eglinton on April 30, 1930, and on July 14, 1930, he gave notice of his intention to oppose the grant upon application No. 328,584 on grounds similar to those advanced in opposition to the grant under the earlier application, and in paragraph 4 of the statement under r. 42 which accompanied the notice he intimated that under the ground of opposition which alleges that the nature of the invention is not sufficiently or fairly described or ascertained in the complete specification, attention would be directed to the applicant's parent application No. 322,297, and it would be contended that the date claimed had been allowed ultra vires the Acts and Rules, that the application should be dated of April 12, 1930, that in its present form the specification is misleading in that the date of leaving the complete specification is given as July 26, 1929, when in fact it was not left until April 12, 1930, and the date of the application as October 26, 1928, when in fact it should be given as April 12, 1930. And it is substantially upon these materials that the relief sought is claimed. Affidavits have been filed in support of the motion and on behalf of Mr. Wingate in opposition, from which it appears that the facts are as I have stated them, and that Wingate is ready and willing to amend specification No. 322,297 by inserting a disclaimer, but that no such amendment will be permitted so long as the application is under opposition.

The Comptroller-General has also filed an affidavit wherein he states that the decision was come to in accordance with the practice of the Patent Office for over twenty years, and that having regard to that practice, he did not think it necessary before coming to the decision to apply to the Law Officer under s. 74 for directions in the matter, that as the decision and practice have now been challenged, he has applied to the Law Officer under the section, but the Solicitor-General proposes to defer giving any directions until this motion has been disposed of, and that he, the Comptroller-General, has been advised that the question of antedating the application is one which he would be bound to hear and decide in the proceedings under s. 11, and that any decision on the question will be subject to appeal to the Law Officer.

I shall have to come back to this affidavit by and by. Mr. Whitehead, in supporting the motion, puts his case in this way. By s. 13 of the Act, " except as otherwise expressly provided by this Act," a patent shall be dated and sealed as of the date of the application. Rule 13, which contemplates the fixing of an earlier date where a person is making application for a separate patent for an invention excluded by amendment from an earlier specification, does not apply to this case, because (*a*) Wingate has not included in his earlier application, according to the report of the examiner, more than one invention, and (*b*) is not by his later application applying for a separate patent for an invention excluded by amendment from the earlier application. Therefore, says Mr. Whitehead, r. 13 cannot be relied on, and there is no other express provision under which an earlier date than the date of application can be affixed to the grant. What then is the position? The Comptroller says it must not be assumed that he was purporting to act under r. 13, but he has heard the matter of the date argued on behalf of Mr. Wingate, and has directed that the later application is to bear the date of the original application. Where is there any warrant or authority in the Act or rules for his so doing, and what foundation is there for the advice which he has received that he is bound to review the question of date on the hearing of the opposition proceedings under s. 11? And in support of his argument that the procedure has been of an ultra vires nature, and that the Comptroller cannot now review the conclusion he has already arrived at, he refers to s. 13 and the decision in the case of *Stromberg Motor Devices Co.'s Application* (1), where the Law Officer held that the Comptroller, having allowed an application made under r. 3 (*a*) of the Temporary Rules of 1914 for the priority date under s. 91, had no jurisdiction to revise his original decision, and that the date claimed under s. 91 must be allowed.

Rule 3 (*a*) provided that the Comptroller might at any time during the continuance of the Rules extend the time prescribed by the Act, or any Rules made thereunder, for doing any act or filing any document upon such terms and subject to such conditions as he might think fit where it was shown to his satisfaction that the applicant had been prevented from doing the act or filing the document by reason of circumstances arising from the war.

Under this rule the Comptroller first allowed the priority date under s. 91, but at a later stage of the proceedings, having considered the documents produced and been made acquainted with fresh facts, decided, after hearing counsel on both sides, that the applicants were not prevented by the war from applying and, accordingly, reversed his earlier decision and disallowed the Convention date.

On appeal to the Law Officer, he decided that the Comptroller had no power to revise his opinion, and that the rule, read in conjunction with s. 91, did not give the Comptroller any authority to do more than consider such facts as he thought fit to take into consideration, and to give his decision, which thereupon bound the parties. When once the Comptroller had been satisfied and had extended the time prescribed by the Act, the applicant was in the same position as he would have been under s. 91, and it was no longer open to the Comptroller on a subsequent investigation, either by reconsidering the facts or by

(1) 40 R. P. C. 405.

hearing the case argued by counsel, to withdraw the extension of time he had already given.

It is, I think, clear that the decision was confined to the subject-matter under consideration, the true construction of r. 3: did it contemplate that the Comptroller having once decided that the conditions precedent had been complied with, could afterwards change his attitude? and the answer was in the negative. I cannot read the judgment as in any way prejudicing the position of Mr. Whitehead's clients, and, in my opinion, it discloses no adequate grounds for granting the relief they are asking for.

Then the next point they advance is this, that the antedating of the patent not being one of the grounds of opposition specifically enumerated in s. 11, the applicant may successfully object to the point being raised in the opposition proceedings, and thereby deprive the opponents of the last opportunity of having the point as to the date argued and dealt with. I think the answer to that point is the long established practice of the Office disclosed in the Comptroller's affidavit. It is stated also in the Comptroller's judgment in *Stromberg's* case (1), where he says: "As regards this preliminary point"—that is, that the matter could not be reopened in the opposition proceedings—"I think it may properly be raised on these proceedings. It is true that the question of the date was provisionally decided at an earlier stage, but it has always been the practice to allow this question to be reopened before the final grant, on any new facts being brought to the Comptroller's notice, or on any suggestion that a vital mistake has been made. It is clear, I think, that such procedure is only just and fair, in view of the fact that the date is obtainable on an ex parte statement, and most important and valuable rights are involved." That this practice was present also to the mind of the Law Officer appears from what he said (2): "I do not take the view that the mere fact that it is not a ground of opposition under s. 11

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(1) 40 R. P. C. 407, line 32.

(2) *Ibid.* 411, line 31.

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precluded the Comptroller from revising his opinion." He seems there to recognize the practice, and he expresses no doubt as to its regularity.

In these circumstances, I come to the conclusion that apart from all other considerations the moving parties have not made out their case that they cannot now obtain a hearing on the question of date, and that it will not be open to the Comptroller to fix another date than the one provisionally named.

But the question remains, had I held the moving parties debarred by the procedure adopted, could I have properly allowed the writ to issue ? I do not think I could. Questions or difficulties of subdivision and antedating are matters arising in the administration of the provisions of the Act upon which the Comptroller can apply to the Law Officer for directions under s. 74. His decision thereon is final, and prohibition will not lie against the Comptroller for acts or decisions which are either subject to appeal to the Law Officer, or which are done at the direction of the Law Officer under s. 74 or against the Law Officer himself.

I think this is the clear result of the decisions in *Tomlinson's* case (1) and *Muntz's* case. (2) See also *In re Van Gelder's Patent.* (3) I think, therefore, the motion fails.

This conclusion obviates the necessity of my giving judgment on two further points raised by Mr. Trevor Watson, the one that this is not a class of case in which the Chancery Division has jurisdiction to entertain an application for a writ of prohibition, and the other that the Comptroller was not acting as a Court in the particular proceeding out of which the motion has arisen. These submissions must be left to be dealt with on some future occasion. For the present I content myself with saying the motion is dismissed with costs.

Solicitors: *Caporn & Campbell ; The Solicitor to the Board of Trade ; Cooper, Bake, Fettes, Roche & Wade.*

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(1) [1899] 1 Q. B. 909.
(2) 39 R. P. C. 335.
(3) 6 R. P. C. 22.

H. L. L.

CHARLES HUNT, LIMITED *v.* PALMER.

CLAUSON J.

1931 July 3.

[1931. C. 1356.]

Vendor and Purchaser—Contract for Sale of Leaseholds—Action for Specific Performance by Vendor—Particulars—Misrepresentation—" Valuable business premises "—Unusual Restrictions on User—Liberty to inspect Lease—Constructive Notice of Contents of Lease.

Leasehold shops described in the particulars of sale as " Valuable business premises " were put up for sale by auction, subject to special conditions of sale and also to the National Conditions of Sale, by one of which—namely, the sixth—it was stipulated that the leases or copies thereof might be examined at the office of the vendors' solicitors before the sale and that the purchaser, whether or not he inspected the same, should be deemed to have bought with notice of the contents thereof. The defendant only became aware of the sale on the day when it was held and, having on that day been supplied by the auctioneers with the particulars and special conditions, but not with the National Conditions, and relying upon the truth of the description in the particulars, he bid at the sale and was declared to be the highest bidder thereat. He then signed the usual form of memorandum to the effect above stated and paid a deposit to the auctioneers. In the course of investigating the title it came to the defendant's knowledge for the first time that the leases under which the properties were held were subject to covenants which prohibited any other trade or business than that of a ladies' outfitter, fancy draper and manufacturer of ladies' clothing from being carried on upon the properties. In consequence of the existence of those restrictive covenants and the failure of the plaintiffs to procure their removal or the licence of the lessors to use the properties for the purposes of any business, the defendant refused to complete the purchase.

In an action by the vendors for specific performance in which the defendant counterclaimed rescission of the contract and to recover his deposit :—

Held, first, that a shop which could be used for one purpose only was not fairly described as " valuable business premises " and, secondly, that such a misleading representation by the plaintiffs in their particulars of sale disentitled them—notwithstanding the sixth condition—to the assistance of the Court to compel the defendant, who purchased in reliance upon the truth of such representation, to specifically perform his part of a contract for a consideration different from that which he was led to expect.

The action was dismissed; and the defendant was declared to be entitled to give a valid receipt to the auctioneers for the deposit.

WITNESS ACTION.

Leasehold premises known as Nos. 238 and 240 Brownhill Road, Catford, described in the particulars of sale as "valuable business premises" and "leasehold business premises," comprising two spacious shops and a large ground floor factory, were advertised for sale by public auction to be held on January 21, 1931, subject to special conditions of sale and to the National Conditions of Sale which contained the following: No. 6. "The lease or under-lease or a copy thereof may be examined at the office of the vendor's solicitors during office hours, on the five working days preceding the day of sale, and the purchaser (whether or not he inspects the same) shall be deemed to have bought with full notice of the contents thereof." No. 10. "The property is sold subject to any land tax . . . . No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale nor shall any compensation be allowed either by the vendor or the purchaser in respect thereof."

The defendant, who carried on the business of a dairyman, having for the first time become aware of the sale on the very day on which the auction was held—namely, on January 21, 1931—and having a mind to acquire the premises for his dairy business, called at the auctioneers, Messrs. Baxter, Payne & Lepper, and was supplied by them with the particulars and special conditions which stated that the properties were sold subject to the National Conditions of Sale, so far as the latter conditions were not inconsistent therewith, but the defendant was not supplied with a copy of the National Conditions. After having viewed the property, the defendant bid at the auction and purchased the property. He then signed a printed form of memorandum which was endorsed on the particulars and special conditions, in which he acknowledged that he was declared the purchaser of the property described in the particulars at the price of 725*l.*, and had paid the sum of 72*l.* 10*s.* to Messrs. Baxter, Payne & Lepper, the auctioneers, and thereby agreed to pay the remainder of the purchase money and to complete the purchase according to the within conditions of sale.

The defendant, who gave evidence at the trial, stated that he would not have bid at the sale, had he known of the restrictive covenants in the leases.

The property was held under two leases respectively dated January 31 and February 3, 1919. Each contained a covenant with the lessors not to carry on upon the premises without the previous consent in writing of the lessors "any other trade or business than that of a ladies' outfitter, fancy draper and manufacturer of ladies' clothing."

Neither before or at the time of the sale was any information given to the defendant of the contents of the leases, nor was any opportunity offered him to inspect them. It was only in the course of investigating the title that, on January 28, 1931, the defendant through his solicitors became aware for the first time that the leases contained those unusual restrictions. After some correspondence between the defendant and the plaintiffs through their respective solicitors, and in consequence of the failure of the plaintiffs to procure the removal of the restrictive covenants or the licence of the lessors for the use of the premises for any business whatever, the defendant's solicitors, by a letter of March 25, 1931, refused to proceed with his purchase and demanded repayment of the deposit.

The plaintiffs accordingly brought this action for specific performance of the alleged contract. The defendant pleaded that the alleged contract ought not to be enforced against him on the ground that by the description of the premises contained in the particulars of sale the plaintiffs represented that any business might be carried on upon the premises; that, by reason of the restrictive covenants in the leases, that description and representation were misleading and induced him to bid at the auction in the belief of their truth.

The defendant counterclaimed rescission of the contract and a declaration that he was entitled to give a good receipt to the auctioneers for the deposit.

A. J. Spencer for the plaintiffs, the vendors. The defendant is bound by condition six of the National Conditions of Sale. He was offered inspection of the leases, but did not choose to avail himself of that offer and has only himself to blame. He is not entitled to say he relied upon the particulars and had no knowledge of the sixth condition, as the special conditions which were attached to the particulars expressly stated that the property was sold subject to the National Conditions of Sale, so far as those conditions were not inconsistent with the special conditions. By the sixth condition the defendant must be deemed to have purchased with full notice of the restrictive covenants in the leases. When therefore the defendant read the particulars he had constructive notice of those restrictive covenants affecting the user of the property. *In re White & Smith's Contract* (1) is distinguishable upon the facts; in that case the purchaser had no constructive notice because he was not given a fair opportunity of inspecting the leases. Further, the plaintiffs are entitled to the protection of the tenth of the National Conditions under which the misstatement in the particulars, if the description of the premises be a misstatement, which is denied by the plaintiffs, was not to annul the sale: *Curtis* v. *French.* (2)

C. D. Myles for the defendant. The defendant was not aware of the sale until the day on which it was held. He was not supplied with a copy of the National Conditions and had no fair opportunity of inspecting the leases. He relied upon the description of the premises in the particulars as " valuable business premises "—and he was reasonably justified in so doing—by which he was in fact and in reason led to believe that he was buying premises on which any business might be carried on subject, of course, to any restrictions imposed by the general law of the land and any statutory restrictions in force with regard to any particular trade. The plaintiffs did not, as in the circumstances of this case it was their duty, disclose to the defendant the existence of these unusually restrictive covenants, nor did they give him a fair opportunity of inspecting the leases: *Reeve* v. *Berridge* (3); *In re White & Smith's Contract* (1); *In re Haedicke & Lipski's Contract* (4); *Molyneux* v. *Hawtrey.* (5) The description in the particulars was so definite as to exonerate the defendant from a charge of negligence in not making inquiries before or at the sale as to the existence of restrictive covenants. In the circumstances, a Court of equity will in its discretion refuse to assist the plaintiffs by compelling the defendant to complete. I rely upon the reasoning contained in dicta of Stirling J. in *In re Davis & Cavey.* (1) In this case the Court ought to exercise the discretion which it now has under s. 49 of the Law of Property Act, 1925 (2), in favour of the defendant by ordering repayment to him of the deposit.

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(1) [1896] 1 Ch. 637.

(2) [1929] 1 Ch. 253.

(3) (1888) 20 Q. B. D. 523.

(4) [1901] 2 Ch. 666.

(5) [1903] 2 K. B. 487.

Clauson J. [after stating the facts, continued:] The question is whether, in the particular circumstances which I have stated, the defendant ought to be compelled by this Court to complete the contract on his part for the purchase of this property and pay the remainder of the purchase money. The defendant, who is a willing purchaser, is now in this position, that he has discovered that the property is subject to restrictive covenants which have the effect of preventing him from carrying on any trade or business upon the premises, except that of a ladies' outfitter, fancy draper and manufacturer of ladies' clothing; and being a dairyman and desirous of acquiring the premises for the purposes of his dairy business, the premises would obviously be of little use to him if he is bound to complete the purchase. The plaintiffs contend that he is bound to complete by the terms of his contract, that he must be treated as having, at the time when he contracted to purchase, known of the existence of the restrictive covenants in the leases, notwithstanding the description of the property in the particulars of sale as "valuable business premises." In my judgment the plaintiffs must fail in their action to force the defendant to complete his contract. The property put up for sale by auction was described in the particulars of sale as "the valuable business premises" (printed in big type) "situate and being Nos. 238

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(1) (1888) 40 Ch. D. 601.

(2) Sect. 49, sub-s. 2: "Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it think fit, order the repayment of any deposit." Sub-s. 3: "This section applies to a contract for the sale or exchange of any interest in land."

and 240 Brownhill Road, comprising two spacious shops and a large ground floor factory," and also as " valuable leasehold business premises." In *In re Davis & Cavey* (1) Stirling J. says (2): " The property was put up for sale as business premises, and upon that it seems to me that the purchaser would be entitled to have property conveyed to him on which he could carry on any business, subject only to the restrictions imposed by the general law of the land—for example, so as not to create a nuisance—and subject also to the statutory restrictions in force with regard to any particular trade where such restrictions exist. But with these exceptions he would be entitled to expect the property to be conveyed to him free from all restrictions." After the passage which I have read Stirling J. goes on to say that it was not necessary to consider upon that application whether upon the true construction of the covenant in that case, which was not to exercise or carry on, in or upon the demised premises any trade or business or occupation, it was an absolute covenant not to carry on " any " trade or business on the property, or whether the prohibitive words must be construed as intended to apply to trades or businesses the carrying on of which involved annoyance, nuisance or damage of the lessors or of the tenants of the adjoining property. Then the learned judge continues (3): " What are his "—the purchaser's—" rights? On the one hand, he is bound by the contract not to make any objection in respect of any clause, matter, or thing contained in the original lease, which this objection is. On the other hand, if the vendor seeks specific performance of the contract a Court of Equity has a discretionary jurisdiction to say whether it will compel a purchaser to carry out "—the word " take " in the report is obviously a misprint for " carry out "—" a contract under which he will get something different from that which he has been led to expect he will get. Whenever a vendor chooses to put into his conditions of sale anything which misleads the purchaser, the latter may decline to perform the contract, and may say,

(1) 40 Ch. D. 601.

(2) 40 Ch. D. 605.

(3) 40 Ch. D. 606.

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'this is not a contract which a Court of Equity will enforce against me.' That is a different thing from saying that the title is not such a title as the vendor contracted to give him." In my view, if I were to compel the defendant to carry out his part of the contract, I should be forcing him to take something different from that which he was led by the plaintiffs to expect he would get under the contract. In the circumstances of this case, in my view, it is primarily incumbent upon the plaintiffs to show that they are in a position to convey to the defendant the thing which by the particulars of sale they led him to believe he was to get under the contract. Until they have shown that, it is irrelevant to consider the sixth of the National Conditions of Sale which, as counsel on behalf of the plaintiffs contended, saddled the defendant with notice of the restrictions in the leases. *A shop which may only be used for one trade cannot fairly be described as "valuable business premises." In my judgment it would be wrong for a Court of equity to compel the defendant to complete the purchase. Accordingly the plaintiffs' action for specific performance fails and must be dismissed.

With regard to the counterclaim by the defendant for repayment of the deposit, in exercise of the discretionary power conferred upon me by s. 49 of the Law of Property Act, 1925, I will declare that the defendant is entitled to give a valid receipt to the auctioneers for the deposit.

Solicitors: *W. B. Wattson; Charles Marchant Benwell.*

H. C. H.

[FARWELL J.

1931

June 23, 24, 25.

In re KING'S SETTLEMENT.

KING *v.* KING.

[1929. K. 647.]

Settlement—Keeping Trusts off Title—Conveyance by Settlor to Trustees—Direct Misrepresentation implying absolute Ownership—Contemporaneous Declaration of Trust—Equitable Mortgages by Trustees—Incumbrancers without Notice—Priority over Settlor and other Beneficiaries—Estoppel.

In order to keep the trusts of a settlement off the title, the settlor conveyed the property to certain grantees by deed of gift in consideration of his love and affection for them. The grantees at the same time executed a deed poll declaring trusts in favour of the settlor and other beneficiaries. The conveyance and the title deeds were handed to the grantees, the deed poll being retained by the settlor's solicitor.

The grantees purporting to be absolute owners created equitable incumbrances on the property in favour of certain incumbrancers for value without notice of the trusts:—

Held, that, as the settlor's conveyance contained a direct misrepresentation necessarily implying that the grantees were absolute owners, the settlor and the other beneficiaries claiming under him were estopped from denying this statement against the equitable incumbrancers, and their prior equity was therefore postponed.

Carritt v. *Real and Personal Advance Co.* (1889) 42 Ch. D. 263 and *Burgis* v. *Constantine* [1908] 2 K. B. 484 distinguished.

WITNESS ACTION.

On February 24, 1925, the plaintiff F. W. King (hereinafter called "the father") inherited two freehold houses, 4 and 8 Crooked Usage, Finchley, and a leasehold house, 45 Briarfield Avenue, Finchley, from an intestate daughter Ellen, to whom he took out administration on May 22.

He was desirous of conveying this property to his eldest son and his wife (hereinafter called "the defendants King") absolutely, having full confidence that they would look after him and their mother and their sister Ruth (a person of unsound mind not so found by inquisition).

The father and the defendants King were all anxious that no trust should be mentioned, and instructed the father's solicitor accordingly. The solicitor however thought that there ought to be a contemporaneous declaration of trust, and ultimately persuaded the parties to agree to this course. The following deeds were then drawn and executed by the necessary parties after the fullest explanation.

By a conveyance dated December 22, 1925, and made between the father and the defendants King, after reciting the father's title and reciting that the father was "desirous of giving the hereditaments and premises hereinafter described" to the defendants King. It was witnessed that "in consideration of his love and affection" for the defendants King, the father, as beneficial owner, assigned the leasehold property to the defendants King for the residue of the ninety-nine years' term, and conveyed the freehold property to them in fee simple.

This deed was executed by all parties and registered in Middlesex.

By a deed poll of the same date under the hands and seals of the defendants King, reciting that the deed poll was supplemental to the preceding indenture, and reciting that "it was agreed prior to the date of the principal Indenture" that the defendants King "should execute such declaration of trust as is hereinafter contained," it was witnessed that the defendants King "declare that they hold all the said hereditaments and premises described in and assigned and conveyed to them by the principal Indenture and the proceeds of sale of the same or of any of them and all rents profits and emoluments of whatsoever description of the same," upon trust to pay the income of the same to their father and mother during their joint lives, and after the death of the survivor of them In trust to apply the same in such manner in all respects as the defendants King in their uncontrolled discretion think fit for the maintenance support and benefit and comfort of the plaintiff Ruth during her life and after her death In trust to divide such part (if any) as should then remain equally between all the grandchildren of the father and mother.

This deed purported to have been executed by the defendants King, and the Court held as a fact that it was so executed. It was not registered in Middlesex.

From this time the defendants King really held the leasehold term and the legal estate in the freeholds as trustees, but on January 1, 1926, the leasehold term and the legal estate in the freeholds vested in the father and mother as joint life tenants under the transitional provisions of the Settled Land Act, 1925 (15 Geo. 5, c. 18), and the Law of Property Act, 1925 (15 Geo. 5, c. 20).

On April 21, 1926, the father's solicitor handed the title deeds, including the conveyance of December 22, 1925, to the defendants King, retaining the declaration of trust, of which they asked for a copy. The defendants King then commenced to deal with the property as absolute owners.

On June 24, 1926, they sold the leasehold property to the defendant Kerr for 675*l*. This sale was originally impeached in this action, but as the father was not at first dissatisfied with the sale, which he thought would give him more income, the action was discontinued against the defendant Kerr.

On February 29, 1928, the defendants King mortgaged 4 Crooked Usage to the defendant Beard to secure 2250*l*. The title was thoroughly investigated, and all proper searches, including searches in Bankruptcy and the Middlesex Registry, were made without getting notice of any trust. It was suggested that the defendant Beard had a legal estate, but the point was not argued or decided, the case being dealt with on the footing that he was an equitable incumbrancer.

In June, 1928, the defendants King deposited the deeds of 8 Crooked Usage with the National Bank, Ld. (hereinafter called "the defendant bank"), to secure a 600*l*. overdraft on their joint account. The title was thoroughly investigated and all proper searches made, and, there being no notice of any trust, the overdraft was allowed.

On August 9, 1929, after these dealings had come to light, the father, mother and the daughter Ruth, by her father as next friend, commenced this action against the defendants King, the defendant bank, the defendant Beard, and the defendant Kerr, impeaching all the transactions.

As already stated, the action against the defendant Kerr was discontinued.

As against the defendant bank the plaintiffs asked for a declaration that the bank had no enforceable lien or charge on 8 Crooked Usage, and for an order for delivery of the title deeds to the father and mother as joint life tenants.

As against the defendant Beard they asked for a similar declaration and order as to 4 Crooked Usage.

As against the defendants King they asked for administration of the trusts of the settlement, with all proper accounts and inquiries, and for an appointment of new trustees in their place.

The defendants King, who appeared in person, said that they were beneficial owners, and denied the existence of any trust. They took no part in the legal argument.

The defendant bank did not admit the existence of any trust, and contended that even if it were established the father and the beneficiaries claiming through him as volunteers were estopped by his conduct from setting it up against the bank.

The defendant Beard relied on the same estoppel.

Swords K.C. and *Mulligan* for the plaintiffs. The trust is clearly established, and the plaintiffs are entitled to full relief against the defendants King.

As against the incumbrancers, in addition to the fact that the father and mother have the legal estate, the plaintiffs' equitable title is prior in time to that of the incumbrancers, and the onus is on those defendants to displace it.

Vaisey K.C. and *Wilfrid Hunt* for the defendant bank. The conveyance of December 22, 1925, contains two material misstatements on which we relied. First, it recites that the father was "desirous of giving" the property to the defendants King, and secondly, it conveys the property "in consideration of his love and affection" for them. In fact it was not a deed of gift at all, and the real consideration was the declaration of trust.

Now a bare conveyance without more to the defendants King might have passed as merely ordinary conveyancing suppressio veri, leaving the plaintiffs' prior equity unaffected :

Carritt v. *Real and Personal Advance Co.* (1) But if, as here, the conveyance contains "any direct misrepresentation on the face of it," scilicet any direct suggestio falsi, the prior equity is affected: *Carritt* v. *Real and Personal Advance Co.* (2); *Rimmer* v. *Webster.* (3) Here the conveyance clearly represents that the defendants King take an absolute beneficial interest, and the father and the volunteer beneficiaries claiming under him are estopped from denying the title of the defendants King against any subsequent purchaser or incumbrancer for value thereunder.

The father was guilty of the grossest negligence in not registering the declaration of trust in Middlesex.

Braund for the defendant Beard adopted the same argument.

Swords K.C. in reply. The conveyance of December 22, 1925, uses ordinary conveyancing language appropriate to a voluntary gift, and contains no misstatement raising an estoppel. The case is covered by *Carritt's* case. (1) It is in accordance with the ordinary usages of mankind that the legal estate in property should be conveyed to and the title deeds deposited with trustees, and an equitable incumbrancer from them gets no priority over their real beneficiaries: *Burgis* v. *Constantine.* (4)

Again, this was a voluntary conveyance; and having regard to a possible avoidance in bankruptcy within the next ten years the incumbrancers ought to have asked the father himself as to his means at the date thereof, when all the facts would have come out.

FARWELL J. [after stating the facts, and holding that the incumbrancers' solicitors were not bound to ask the father whether he was solvent at the date of his voluntary conveyance, but had fulfilled their duty by inquiring of other persons, and that even if they had asked the father as to his solvency in 1925, his memory was such that he would probably have told them nothing about the declaration of trust, continued :]

(1) 42 Ch. D. 263.
(2) Ibid. 271, 273.
(3) [1902] 2 Ch. 163, 174.
(4) [1908] 2 K. B. 484, 501–503.

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KING'S SETTLEMENT, *In re.* KING *v.* KING.

It is clear that these properties since December 22, 1925, have been subject to a legal binding trust in the hands of the defendants King, that their dealings since that date have been breaches of trust in fraud of their beneficiaries, and that the plaintiffs are entitled to full relief against them.

But as against the defendant bank, who are only equitable incumbrancers, it is contended that the beneficiaries' equity being prior in date must prevail. The same contention is raised against the defendant Beard, treating him as an equitable incumbrancer, and disregarding for the moment his possible claim to a legal estate.

Now in my judgment it is not open to the father, as against these incumbrancers, to set up that the conveyance of December 22, 1925, did not operate as an absolute gift to the defendants King. I have considered all the authorities cited, and if this were a case of using merely ordinary conveyancing language, as in *Carritt's* case (1), I should follow Chitty J.'s decision. But that case has no application here. The present case is not an instance of the use of an ordinary conveyancing form, not exhaustively accurate, but without any actual misstatement of fact. That was *Carritt's* case. (1) Here the conveyance contains an actual definite misstatement of fact. If a grantor conveys property in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction, but that the grantees take on a secret trust not disclosed in the conveyance.

The truth is that the conveyance and declaration of trust were all one transaction, and for the grantor to allow the conveyance alone to be put forward as the true transaction, and then to deny it, is clearly contrary to the ordinary principles of estoppel. As against the incumbrancers, the father cannot be heard to say that the conveyance does not give the defendants King an absolute title. Estoppel, of course, can only operate in favour of persons acting on the faith of the misrepresentation. In the present case it can

(1) 42 Ch. D. 263.

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only assist the incumbrancers. It prevents the father recovering the property free from their incumbrances.

It is contended however that there is no estoppel against the other beneficiaries, but I do not accept the view that the volunteer beneficiaries claiming under the father as settlor are not bound by his estoppel.

The plaintiffs rely strongly on *Carritt's* case (1) and on *Burgis* v. *Constantine* (2), particularly on Farwell L.J.'s judgment in the latter case. He said: "As has been pointed out by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *The Queen* (3), the mere fact that a person has transferred the legal ownership of stock or shares or other property, real or personal, to a trustee, and given him the title deeds, or the securities, or other indicia of title, does not justify any one in assuming that the person to whom such transfer is made is the beneficial owner. If the trustee does, in fact, deal with the property, and convey the legal ownership to a bona fide purchaser or mortgagee for value without notice, the cestui que trust has to bear the loss. If such a subsequent purchaser or mortgagee does not get the legal estate it is because he has not taken those precautions which the law allows him in order to protect himself from all risks; and he cannot set up the apparent ownership of the trustee as evidence of any misconduct or negligence on the part of the beneficial owner, because it is in accordance with the usages of mankind that the legal estate in property should be conveyed to, and the indicia of title deposited with, trustees, and no other member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him from which a duty towards him can be inferred. . . . . We are therefore relegated to the ordinary doctrines of equity in considering equitable claims to shares in a ship standing in the name of a registered owner. Then what is there here which can be deemed to amount to a suggestion to the defendant that W. Hine was the beneficial owner of the shares, or to an invitation to deal with him on that footing?"

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(1) 42 Ch. D. 263, 271, 273.

(2) [1908] 2 K. B. 484, 501–503.

(3) (1875) L. R. 7 H. L. 496, 505.

The last sentence means that in that case there was nothing to justify a person dealing with the trustee in assuming that he might not be a trustee, and it is really in favour of the incumbrancers and not of the plaintiffs. Here there was everything on the face of the conveyance to indicate that the defendants King were not trustees, but absolute owners. It was an absolute conveyance to them in consideration of the grantor's love and affection. It is a very unusual form for the creation of a trust to make an out and out gift to the donees, and then have a concealed declaration of trust. It is hopeless to maintain that it is an ordinary sort of transaction, under which any person could possibly suspect that he was dealing with trustees.

I have now to decide between the equities of the beneficiaries, and of the incumbrancers, treating them both for the moment as equitable incumbrancers. Prima facie the beneficiaries' equity, being earlier in date, ought to prevail. But when I find that their title is based on a document in a form wholly misleading and resulting necessarily in third parties being wholly misled as to the character in which the defendants King take the property, I should be going against all equitable principles if I were to hold that the beneficiaries' equity prevailed over that of other persons acting in complete innocence and misled by the settlor, through whom alone the beneficiaries claim, and I should be wrong if I allowed the equity of the settlor and his beneficiaries to prevail. I need not therefore consider whether the defendant Beard has a legal estate.

The incumbrancers must hand over their title deeds on payment of their incumbrances. There must be a full administration order, and the defendants King must be removed and new trustees appointed. The plaintiffs must pay the incumbrancers' costs, and recover those costs and their own costs from the defendants King. Liberty to apply.

Solicitors: *Ernest Acton Kite; Stephenson, Harwood & Tatham; T. Richards & Co.*

G. R. A.

BENNETT J.

1931

June 5.

In re WATTS.

COFFEY *v.* WATTS.

[1931. W. 839.]

Power of appointment—Marriage settlement—Power exercisable by deed with consent of settlor's mother—General or special power.

A marriage settlement, dated in 1904, contained a clause empowering the settlor (the wife) at any time during the life of her mother by deed to revoke (with the consent of her mother) the trusts declared by the settlement, and to appoint and declare (with the consent of her mother) any new or other trusts powers and provisions concerning the premises to which such revocation should extend. By a deed, dated in 1913, the settlor, with the consent of her mother, exercised the power of revocation and new appointment in such a manner that after her death in 1928 the question arose whether certain trusts declared by the deed of 1913 were valid, their validity depending upon the decision by the Court of the question whether the power of revocation and new appointment was a general power or a special power:—

Held, that it would not be right to hold that, upon the terms of the powers contained in the marriage settlement, the settlor was in substance the owner of the property, and consequently free to deal with it in any way she pleased, and that the power was a special power.

In re Dilke [1921] 1 Ch. 34 and *In re Phillips* [1931] 1 Ch. 347 distinguished.

ORIGINATING SUMMONS.

By a marriage settlement dated September 24, 1904, and executed in contemplation of the marriage of Ellen Dorothy Abbott, spinster, with Malcolm Newbegin Watts, certain property was settled by Ellen Dorothy Abbott on trusts under which, so far as material, she was to receive the income during her lifetime, and after her death the settled property was to be held on trust for all her children, who being sons should attain the age of twenty-one years or being daughters should attain that age or marry under that age. The settlement contained the following clause: "It is hereby agreed and declared that the said Ellen Dorothy Abbott shall be entitled at any time during the lifetime of the said Mary Abbott" (the mother of Ellen Dorothy Abbott) "with the consent in writing of the said Mary Abbott by any deed or deeds to revoke all or any of the trusts powers and provisions declared and contained by and in these presents concerning the said trust premises or any part thereof and may by the same or any other deed or deeds with the consent in writing of the said Mary Abbott appoint and declare any new or other trusts powers and provisions concerning the premises to which such revocation shall extend."

By an indenture of revocation and new appointment, dated December 12, 1913, Ellen Dorothy Abbott (then Ellen Dorothy Watts) with the consent of Mary Abbott exercised the power of revocation and new appointment contained in the marriage settlement, and thereby settled the property upon certain trusts, including trusts after the death of Imlay Newbegin Watts (the only child of the marriage), for the benefit of his children (if any).

The defendant Imlay Newbegin Watts was born in 1905. Mary Abbott died on July 18, 1926, and Ellen Dorothy Watts died on January 11, 1928.

The trustees of the marriage settlement took out a summons for the determination of the question whether the trusts above referred to declared by the deed of 1913 were valid, their validity being dependent upon the determination by the Court of the question whether the power of revocation and new appointment was a general power or a special power, inasmuch as, if the power were a special power, the trusts would be void, as infringing the rule against perpetuities.

R. J. T. Gibson for the plaintiffs. This is a general power, and the only fetter on the power is the consent of Mary Abbott, the mother of Ellen Dorothy Watts. The case is governed by *In re Dilke* (1) and *In re Phillips.* (2) In the latter case it was held that trustees, whose consent was required to the exercise of the power in question, had no duties, and that the power was a general power. In the present case the person whose consent was required was the mother of the settlor. If trustees have no duties in this respect a fortiori the mother of the settlor can have no duty. There is no reason for a power of appointment with consent being treated as a special power.

(1) [1921] 1 Ch. 34.

(2) [1931] 1 Ch. 347.

[He referred to Gray on Perpetuities, 3rd ed., ss. 526 and 527.]

A power exercisable by two people may well be a general power.

Harold Christie for the defendant. This case is distinguishable from *In re Dilke* (1) and *In re Phillips.* (2) The principles of cases like *In re Dilke* (1) do not apply when the rule against perpetuities is involved, because in order to escape from the rule against perpetuities it is necessary to establish absolute dominion. The mother of the settlor is the person with special knowledge of the family, who is expected to use such special knowledge to prevent the power from being unwisely exercised. If, in the present case, it is sought to establish that the appointment is good as regards the rule against perpetuities, it is necessary to show that at the time of the exercising of the power of appointment Mrs. Watts was in the position of an absolute owner, i.e., that she had an unrestrained power of alienation. The consent required from Mrs. Abbott, however, involved the exercise of a judicial discretion. In *In re Phillips* (2) the trustees were not bound to consider the matter. *Eland* v. *Baker* (3) is not unlike the present case. In that case the consent of trustees was required instead of (as in the present case) the consent of the mother-in-law of the husband, and that decision supports the contention that a fiduciary duty was imposed on Mrs. Abbott. The power is a special power, which ought to be read back into the original settlement. The defendant's contention is very strongly supported by the decision of the Court of Appeal in Northern Ireland in *In re Dunbar-Buller.* (4)

BENNETT J. By a marriage settlement made on September 24, 1904, certain property was settled by Miss Ellen Dorothy Abbott on trusts, under which, so far as material for the purposes of the question which I have to decide, she was to receive during her life the income, and after her death the settled property was to be held in trust for all

(1) [1921] 1 Ch. 34.
(2) [1931] 1 Ch. 347.
(3) (1861) 29 Beav. 137.
(4) [1923] 2 I. R. 143.

the children of the said Ellen Dorothy Abbott who, either before or after her decease being sons should attain the age of twenty-one years or being daughters should attain that age or marry under that age, in equal shares, but if there should be but one such child, then the whole to be in trust for such one child. Then, after certain provisions which are not material, the settlement contains a clause in the following terms: [His Lordship read the clause in which the power of revocation and new appointment was set out, and continued :] On December 12, 1913, Ellen Dorothy Abbott (then Ellen Dorothy Watts), with the consent of the said Mary Abbott, exercised the power of revocation and new appointment contained in the marriage settlement. At the date of the revocation and new appointment there was in existence one child, the defendant Imlay Newbegin Watts, then and now the only child of the marriage of Ellen Dorothy Abbott with her husband Malcolm Newbegin Watts. The defendant I. N. Watts at the date of the revocation and new appointment was eight years old, and the new appointment declared certain trusts for the benefit of the defendant, his wife and children which, if the appointment is to be read into the original settlement, are, it is conceded by Mr. Gibson, who represents the trustees of the settlement, void on the ground that they infringe the rule against perpetuities; and the question whether they are void on that ground depends on whether the power of revocation and new appointment contained in the marriage settlement is a special power, in which case the trusts contained in the deed of new appointment have to be read into the marriage settlement, and their validity has to be determined on the footing that they were originally written into the marriage settlement, or whether the power of new appointment contained in the settlement is a general power, i.e., general in the sense that the person to whom the power was given was the person who was thereby made the absolute owner of the settled property over which the power extended.

Mr. Gibson, appearing on behalf of the trustees, argues, in the interests of unborn persons, in favour of the validity of the trusts contained in the deed of December 12, 1913, and founds his argument, that the power of appointment is a general power, on two authorities: *In re Dilke* (1) and *In re Phillips.* (2) He says that, according to these two cases, a power of appointment, which may be exercised with the consent of another person, is a general power of appointment, and therefore this power, which is contained in the marriage settlement of 1904 and which is exercisable with the consent of Mary Abbott, is a general power of appointment.

I think Mr. Christie is right in saying that in interpreting the language used in the settlement one must have regard to the fact that it is a settlement made in consideration of marriage. It is also material, in interpreting the language used in the instrument, to have regard to the fact that the power of revocation and new appointment is restricted in point of time to the lifetime of Mary Abbott, and also to her consent in writing being given both to the exercise of the power of revocation and to the exercise of the power of new appointment. These seem to me to be facts which afford a real ground of distinction between the construction to be placed on the marriage settlement and the construction placed by the Court of Appeal in *In re Dilke* (1) and by Maugham J. in *In re Phillips* (2) on the documents which they had to consider. It seems to me that it would not be right to hold that, upon the terms of the powers contained in the marriage settlement which I have to construe, Ellen Dorothy Abbott (afterwards Ellen Dorothy Watts) was in substance the owner of the property, and consequently free to deal with it in any way she pleased.

It seems to me that it is essential to arrive at the conclusion that she was free to deal with it in any way she pleased before one can say that the instrument by which the power could be exercised is not to be read into the original settlement for the purpose of determining the validity of the trusts which the new appointment creates.

In my judgment, therefore, the power conferred on Ellen Dorothy Watts by the marriage settlement was not a general

(1) [1921] 1 Ch. 34.

(2) [1931] 1 Ch. 347.

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power but a special power, and it follows from that, that the trusts to which I have referred in the deed of revocation and new appointment are void as infringing the rule against perpetuities. There will be a declaration that the defendant is absolutely entitled, and the costs of all parties will be payable out of the fund.

Solicitors: *Warren, Murton, Miller & Foster.*

J. L. D.

RAINGOLD *v.* BROMLEY.

LAWRENCE L.J.*
1931
June 30; *July* 1

[1931. R. 274.]

Contract—Agreement to grant a Lease "subject to the terms of a lease"—Terms of Lease agreed—Lessor's Refusal to grant Lease—Claim to Damages.

The defendant employed house agents to let shop premises at 155 High Street, Bromley, Kent, and on December 9, 1930, the plaintiff, after inspecting the premises, offered to take a lease. In reply the house agents wrote to him on the same day: "Corner shop, 155 High Street, Bromley. Referring to our conversation this morning on the telephone, we confirm that, subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a 7, 14, or 21 years' lease at a rent of 350*l.* per annum for the first 14 years, rising to 375*l.* for the last 7 years. . . . . We have instructed Mr. Bromley's solicitors to put the draft lease in hand immediately to forward to your solicitors. . . . ." The draft lease was forwarded on the same day, and after negotiations as to its terms the defendant's solicitors wrote on December 29, 1930, to the plaintiff's solicitors: "We have now received our client's instructions on the draft lease, and he is prepared to accept your client's alterations. We are, therefore, having the lease engrossed, and will forward you a counterpart for execution by your client in due course." This was done, but the defendant then refused to execute the lease, and on January 24, 1931, granted a lease of the premises to some one else. On February 3, 1931, the plaintiff commenced proceedings for specific performance, or (alternatively) damages:—

Held, that there was no binding contract to grant a lease, as the expression "subject to the terms of a lease" in the letter of December 9, 1930, meant "subject to the terms to be contained in a lease executed by the lessor." It followed that even if the defendant's solicitors were the agents of the defendant to communicate by their letter of

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* Sitting as an additional Judge of the Chancery Division.

December 29, 1930, the fact that the defendant had himself agreed to the terms of the lease, so that this letter was a sufficient memorandum of the agreement signed by the defendant's duly authorized agents within s. 40 of the Law of Property Act, 1925, there was no binding contract, because the result of the letter of December 9, 1930, was that there could be no concluded agreement until the lease had been executed.

WITNESS ACTION.

The defendant, Frederick Russell Bromley, being desirous of letting his shop premises known as No. 5 Broadway Buildings on the ground floor of No. 155 High Street, Bromley, in the County of Kent, put the matter in the hands of his house agents, Messrs. Baxter, Payne & Lepper, who by a circular informed the plaintiff, Barnet Raingold, that the premises were to be let. On December 9, 1930, the plaintiff, after visiting the premises with his manager, made an offer over the telephone to take them. The agents then communicated with the defendant, and on the same day wrote to the plaintiff in the following terms: "Corner Shop, 155 High Street, Bromley.—Referring to our conversation this morning on the telephone, we confirm that subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a 7, 14 or 21 years' lease at a rental of 350*l.* per annum for the first 14 years, rising to 375*l.* for the last 7 years. It is understood that you will instal your own shop front, and that the plans and elevations will be submitted beforehand to our client for approval. We have instructed Mr. Bromley's solicitors to put the draft lease in hand immediately to forward to your solicitors, Messrs. Teff & Teff." On the same day Messrs. Lovell, White & King, the defendant's solicitors, forwarded a draft lease to Messrs. Teff & Teff for approval. On December 11, 1930, the plaintiff wrote to Messrs. Baxter, Payne & Lepper: "I wish to confirm your letter of the 9th inst., of course this is subject to my solicitors' approval of the lease."

On December 12, 1930, the plaintiff's solicitors returned the draft lease revised, and on December 17 the defendant's solicitors wrote: "We have now received our client's instructions on the draft lease, and we return it to you, as amended by us in green ink. With regard to the payment of rent, our client informs us that it was agreed between his agents and your client that rent should be payable from the time of the granting of the lease. He is not, therefore, prepared to agree to the 24th June as the date for the first payment, but he will agree to accept the 25th March as the date, when a proportionate amount from the date of possession will be payable." On December 23, 1930, the plaintiff's solicitors wrote: "We have now seen our client and return herewith the draft lease further revised. Our client has spoken to Messrs. Baxter, Payne & Lepper, and they have referred one or two of the points on the draft to Mr. Bromley, and we understand the latter has agreed to the rent commencing on the 25th March next, and agrees to our client's selling hosiery, though this we believe is often sold in boot and shoe stores. We further understand that the wood block flooring will be completed by your client as soon as the lease is signed and that in the meantime, a letter will be given undertaking to have this done." On December 29, 1930, the defendant's solicitors wrote to the plaintiff's solicitors as follows: "We have now received our client's instructions on the draft lease, and he is prepared to accept your client's alterations. We are, therefore, having the lease engrossed, and will forward you a counterpart for execution by your client in due course. Our client informs us that he has agreed to complete the wood block flooring as soon as the lease has been signed. . . . . In the meantime, we shall be glad to receive the plans of the proposed new shop front, and a sketch of the signboard to be placed on the shop, for approval by our client's surveyor." On December 30 they sent the counterpart lease for execution, stating that they were that day sending the other part of the lease to their client for execution.

At this stage the defendant declined to proceed further with the granting of the lease to the plaintiff, and on January 24, 1931, he granted a lease of the premises to some one else.

On February 3, 1931, the plaintiff commenced this action, in which he claimed specific performance of the agreement to grant the lease or (alternatively) damages for breach of the agreement.

The defendant admitted at the hearing that he had instructed Messrs. Baxter, Payne & Lepper to write the letter of December 9, 1930, and his solicitors to write the letter of December 29, 1930.

J. M. Gover K.C. and *Danckwerts* for the plaintiff. The letter of December 9, 1930, constituted a concluded agreement between the parties, but left open the date at which the term was to commence. This date was supplied by the draft lease, which was finally agreed by the letter of December 29, 1930, written by the defendant's solicitors to the plaintiff's solicitors. The defendant's solicitors, acting as agent for him and on his express instructions, supplied the missing term. The letters of December 9, 1930, and December 29, 1930, together constitute a concluded agreement, and the plaintiff asks leave to amend his pleadings so as to allege this. A term in a contract may be supplied by subsequent correspondence: *White* v. *Hay.* (1)

[LAWRENCE L.J. The difficulty in the plaintiff's way is the words "subject to the terms of a lease" in the letter of December 9, 1930.]

Those words mean either "subject to this agreement being performed by the execution of a lease" or "subject to the form of lease being agreed." If the first is the right construction it is only stating what the law would imply. It presupposes a contract: compare *Chipperfield* v. *Carter* (2) and *Von Hatzfeldt-Wildenburg* v. *Alexander.* (3) There is no reason why there should not be a contract subject to a future event. In *Von Hatzfeldt-Wildenburg's* case (3) there was held to be no enforceable contract, because the contract entered into was subject to the entry into another contract.

(1) (1895) 72 L. T. 281, 283.
(2) (1895) 72 L. T. 487.
(3) [1912] 1 Ch. 284.

On the alternative view that the words mean "subject to the form of lease being agreed," it is not necessary that the lease should have been executed. Here the form of lease was fully agreed, and there was a complete binding agreement on December 29, 1930.

The defendant will rely on the analogy of "subject to contract" cases, such as *Coope* v. *Ridout* (1) and *Chillingworth* v. *Esche* (2), which decide that if an agreement to sell land is entered into "subject to contract," there will be no enforceable contract until a formal contract has been drawn up and signed. Those cases have really no bearing here. An agreement to sell "subject to conveyance" would be the proper analogy to an agreement to grant a lease "subject to the terms of a lease"; but there is no case deciding that "subject to conveyance" means subject to a conveyance being executed.

Whilst it is true that the mere employment of a house agent to dispose of a house does not give him authority to make a contract: *Keen* v. *Mear* (3), here Messrs. Baxter, Payne & Lepper had the defendant's express authority to write the letter of December 9, 1930; similarly the defendant's solicitors had his express authority to write the letter of December 29. These letters constitute a sufficient memorandum of the contract to satisfy the Law of Property Act, 1925, s. 40: *North* v. *Loomes*. (4)

[LAWRENCE L.J. Is there any reported case when a contract for a lease not specifying the terms of the lease entered into subject to the solicitors' approval of the terms of the lease followed by the solicitors' approval of a draft lease has been held to constitute a concluded contract?]

Curtis Moffat, Ld. v. *Wheeler* (5) is the nearest case. There a contract was entered into "subject to our solicitors' approval of the title."

G. P. Slade for the defendant. On the question of agency the plaintiff has to establish not merely that the house agents

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(1) [1921] 1 Ch. 291.
(2) [1924] 1 Ch. 97.
(3) [1920] 2 Ch. 574.
(4) [1919] 1 Ch. 378.
(5) [1929] 2 Ch. 224.

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and the defendant's solicitors had his authority to write the letters of December 9 and 29 respectively (which is admitted), but that they had authority to conclude a binding contract and sign a memorandum by which the defendant is bound.

[LAWRENCE L.J. If an agent has express authority to sign a particular letter which in fact constitutes a sufficient memorandum of an agreement to satisfy the statute, it is immaterial to inquire whether he was authorized to bind his principal by a contract: *Daniels* v. *Trefusis*. (1)]

It is true that this case introduced a limitation on the effect of *Smith* v. *Webster* (2); but it is going very far to say that in a case where the terms of a lease are being negotiated between solicitors a letter approving the final draft can be treated as a sufficient memorandum of a contract. In *Daniels* v. *Trefusis* (1) the defendant's solicitors forwarded by the defendant's instructions a full record of all that had taken place when the contract was being entered into. It is very different from a case where solicitors in the course of negotiation write a letter: see *Chillingworth* v. *Esche* (3) and *Lockett* v. *Norman-Wright* (4), which support the view that in such a case the solicitor cannot be treated as having authority to bind his principal. ✓

Assuming, however, that the house agents and solicitors had authority to sign a binding contract, still on the construction of the documents there was no concluded agreement. The letter of December 9, 1930, imports into the whole subsequent negotiations the condition expressed by the words "Subject to the terms of a lease." The words "subject to" are essentially words of condition on which the legal relation of the parties must depend. The condition imported is the execution of a lease, and that condition persists throughout the negotiations, so that there can be no binding contract until the condition is fulfilled: *Coope* v. *Ridout*. (5) In that case the offer to purchase was made "subject to . . . . contract." Negotiations followed, and it was alleged that the material terms of the contract were agreed. The Court of Appeal held that, even if this was so, the condition contained in the offer required a written agreement made between the parties to be formally entered into. It has been suggested that there is a vital distinction between " subject to lease " and " subject to contract," but no such distinction is suggested by the authorities or exists in principle. The nearest case is *Chipperfield* v. *Carter* (1), which on examination is seen to support the defendant's contention, and *Winn* v. *Bull*. (2) In the latter case an agreement was entered into to take a lease " subject to the preparation and approval of a formal contract." Sir George Jessel M.R. then pointed out (3) that in such a case something further was needed, and " the agreement is uncertain in its terms and consequently cannot be sustained." It is conceded that the words " subject to contract " prevent a concluded agreement from coming into existence until the formal contract is signed. The expression " subject to the terms of a lease " is at least as strong, and makes the agreement dependent on a lease coming into existence by being executed. In *Winn* v. *Bull* (2) there was not the further element that exists here of the terms of the draft lease having been agreed, but if " subject to the terms of a lease " involves an executed lease coming into existence, nothing that has happened can bind the parties: *Coope* v. *Ridout* (4); *Chillingworth* v. *Esche*. (5) In the latter case a proper contract had been prepared and approved, but it was held that the signature of the contract was essential.

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(1) [1914] 1 Ch. 788, 798.
(2) (1876) 3 Ch. D. 49.
(3) [1924] 1 Ch. 97, 113.
(4) [1925] Ch. 56, 62.
(5) [1921] 1 Ch. 291.

Gover K.C. replied.

LAWRENCE L.J. In this case the plaintiff claims specific performance or alternatively damages for breach of an agreement alleged to have been entered into by him with the defendant for a lease of a shop in High Street, Bromley, Kent.

(1) 72 L. T. 487.
(2) (1877) 7 Ch. D 29.
(3) 7 Ch. D. 31.
(4) [1921] 1 Ch. 291.
(5) [1924] 1 Ch. 97.

The main question is whether there was in fact a concluded agreement as alleged. The defendant employed certain house agents named Baxter, Payne & Lepper to find a tenant for the shop in question. In consequence of a circular received from Baxter, Payne & Lepper the plaintiff on December 7, 1930, after having inspected the property, made a verbal offer to them over the telephone for a lease of the shop. After having communicated this offer to the defendant, Baxter, Payne & Lepper sent to the plaintiff the letter of December 9, 1930, which is relied upon as constituting the agreement sued upon. This letter is headed "Corner shop, 158 High Street, Bromley," and is in the following terms: "Referring to our conversation this morning on the telephone, we confirm that subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a 7, 14 or 21 years' lease at a rental of 350*l.* per annum for the first 14 years, rising to 375*l.* for the last 7 years. . . . We have instructed Mr. Bromley's solicitors to put the draft lease in hand immediately to forward to your solicitors, Messrs. Teff & Teff."

Mr. Gover and Mr. Danckwerts contended that this letter, either by itself or coupled with the letter of December 29, to which I will refer presently, constituted a concluded agreement to grant a lease of the shop to the plaintiff. The first question which naturally arises is whether Baxter, Payne & Lepper had authority to enter into a binding agreement on behalf of the defendant or whether their authority was confined to finding a tenant and negotiating the terms on which the defendant would be prepared to grant a lease. In the witness box the defendant admitted that the offer which had been made by the plaintiff had been communicated to him, and that he had authorized Baxter, Payne & Lepper to write the letter of December 9, 1930. That being so, the only question is whether the letter itself constituted a concluded agreement. It is to be observed that the letter does not purport to be an unconditional acceptance of the plaintiff's offer, but merely informs the plaintiff that, "subject to the terms of a lease," the defendant is prepared to accept the offer. This may mean that the defendant is ready to accept the offer subject to such terms as shall be contained in a lease when it has come into existence and has been executed by him, or it may mean that he is ready to accept the offer subject to the terms of the proposed lease being agreed upon by the parties, that is to say, subject to an agreement being come to between the parties as to the terms to be contained in a lease thereafter to be executed. In either case the letter only expresses the defendant's willingness to accept the offer on certain conditions, and not the definite acceptance of the offer on those conditions. But assuming that the letter amounts to a conditional acceptance of the offer the question then arises, which of the two constructions I have indicated is the true construction. On the same day on which the letter was written the solicitors for the defendant sent a draft lease to the plaintiff's solicitors for approval. The draft lease so sent contained unusual covenants, for instance (to mention only one) a covenant restricting the class of goods to be sold in the shop. On December 11 the plaintiff wrote to Baxter, Payne & Lepper stating that he wished to confirm the letter of the 9th, and added: "Of course this is subject to my solicitors' approval of the lease."

On these facts, even if the alternative construction of the letter of December 9 contended for by Mr. Gover be the right construction, there would obviously be no concluded agreement until after the terms of the lease had been agreed between the parties. It is plain that an agreement to grant a lease the terms of which are to be the subject-matter of a future negotiation and agreement between the parties is not a concluded agreement to grant a lease. It has been argued, however, by Mr. Gover and Mr. Danckwerts that such an agreement amounts to a concluded agreement to grant a lease conditional upon the parties agreeing the term of the lease, and when the parties or their solicitors have reached an agreement as to the terms to be included in the proposed lease the original agreement to grant the lease is absolute. In my opinion this argument is fallacious. An agreement to grant a lease which is conditional on an agreement being reached as to the terms to be contained in it is not an enforceable agreement. The subject-matter of the suggested agreement is the granting of a lease, and if the terms of the lease are not agreed but are left to future negotiation and agreement, the original agreement amounts to nothing more than an agreement to enter into a contract at some future time. It is not as if the alleged agreement in the present case were an agreement defining all the essential terms of the lease subject only to the approval by the solicitors of the form of the lease ; in such a case it might be held that there was a concluded agreement leaving merely the terms of it to be reduced into proper form by the solicitors. Even on the plaintiff's construction the agreement is one which leaves all the terms of the lease to be subsequently negotiated, and is therefore too vague to be enforceable. The matter, however, does not rest there, for in my opinion the true construction of the expression " subject to the terms of a lease " is that contended for on behalf of the defendant. The expression, I think, means " subject to the terms to be contained in a lease executed by the lessor," and therefore implies that a lease has to come into existence and has to be executed by the lessor before any binding agreement is reached. The expression " subject to the terms of a lease " is in my opinion at least as strong as " subject to contract," and was inserted in the letter of December 9 in order to keep the matter open until a lease had actually been executed by the defendant. If this be so, no concluded bargain would be reached until the lease had been executed by the defendant, even although the negotiations as to the terms to be contained in the lease had been brought to a conclusion by agreement between the solicitors of the parties.

Mr. Gover was forced to admit that if the construction contended for by the defendant be the right construction of the letter of December 9 he could not succeed, but he strenuously urged that the alternative construction was the true construction. Even then he was confronted with the difficulty that in the pleadings the only contract alleged is that contained in the letter of December 9, which besides not mentioning what covenants were to be inserted in the lease does not state the date when the term is to commence: he therefore applied for leave to amend by pleading the letter of December 29, and by alleging that the two letters taken together constituted the agreement sought to be enforced. I allowed the pleadings to be treated as amended in this respect, and this amendment necessitates my referring to the correspondence, though I do not propose to go through it in detail, as it has all been read. I turn to the letter of December 17, in which the defendant's solicitors, writing to the plaintiff's solicitors, say: "We have now received our client's instructions on the draft lease, and we return it to you, as amended by us in green ink. With regard to the payment of rent, our client informs us that it was agreed between his agents and your client that rent should be payable from the time of the granting of the lease. He is not, therefore, prepared to agree to the 24th June as the date for the first payment, but he will agree to accept the 25th March as the date, when a proportionate amount from the date of possession will be payable." At that stage of the correspondence all the terms to be contained in the proposed lease had been agreed between the solicitors with one exception—namely, the date from which the rent was to commence to be payable. That letter was received by the plaintiff's solicitors, who took their client's instructions, and on December 23 wrote agreeing that the rent should commence to run from March 25, and therefore altered the draft lease so as to make the first payment of rent become payable on June 24. They sent back the draft lease so altered to the defendant's solicitors notifying them of the alteration. Thereupon the defendant's solicitors wrote the letter of December 29, 1930, which is now relied upon by Mr. Gover as completing the contract. That letter so far as material is in the following terms: "We have now received our client's instructions on the draft lease, and he is prepared to accept your client's alterations. We are, therefore, having the lease engrossed, and will forward you a counterpart for execution by your client in due course. . . . ."

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It is to be noted that in this letter the expression "is prepared to accept" again occurs, but I will once more assume in favour of the plaintiff that that expression is equivalent to "accepts." It is contended that as at this stage of the correspondence all the terms of the draft lease had been agreed, there was a fulfilment of the only condition contained in the letter of December 9, and therefore that the agreement originating in that letter had become a concluded agreement.

This contention raises the question whether the defendant's solicitors had any authority to enter into a contract on behalf of their client, if, as I will assume, they in fact purported to do so. In my opinion they had no such authority. It was then further contended that even if the solicitors had no such authority, yet they were the agents of the defendant to communicate the fact that the defendant had himself agreed to all the terms contained in the draft lease, and that in these circumstances the letter of December 29 was a sufficient memorandum of the agreement made by their client and signed by his duly authorized agents within s. 40 of the Law of Property Act, 1925.

It seems to me that in view of some of the cases to which I have been referred, and particularly of *Daniels* v. *Trefusis* (1), to which I called attention in the course of the argument, there is something to be said for the contention that if the letters of December 9 and 29 are to be construed as contended for by Mr. Gover, then, as by December 29 the parties had in fact agreed to the terms to be inserted in the lease, the defendant's solicitors, in communicating the acceptance by their client of those terms, did in fact sign a memorandum of an agreement made by their client within the meaning of the statute. If that be the true view, then the agreement was not an agreement contained in or concluded by the letters of December 9 and 29 but another agreement which is not pleaded, and was arrived at and concluded for the first time when the defendant himself accepted the final alterations in the draft lease. If however I have correctly construed the letters of December 9 and 29, there is no

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(1) [1914] 1 Ch. 788, 798.

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necessity to go into the questions raised by Mr. Gover under the amended pleadings, as the defendant never purported definitely to accept the plaintiff's offer, and all the negotiations were subject to a lease being executed.

In these circumstances I have reluctantly come to the conclusion that there is no binding contract between the parties. My reason for being reluctant in arriving at this conclusion is because the conduct of the defendant in abruptly breaking off the negotiations when all the terms which were to be inserted in the proposed lease had been agreed and letting the shop to another tenant does not commend itself to me.

[His Lordship, in order to save a new trial in case there should be a successful appeal from his decision, then proceeded to deal with the question what damages it would have been proper to award, had the plaintiff succeeded, regard being had to the fact that the defendant had let the premises to a third party, and thereby rendered it impossible to make a decree for specific performance; and he assessed the damages at 250*l.* 10*s.*, but said that, as it was, the action must be dismissed with costs.]

Solicitors: *Teff & Teff; Lovell, White & King.*

H. C. G.

EVE
and
MAUGHAM
JJ.

1931

June 9.

In re WOODS (BRISTOL), LIMITED.

Company—Judgment against Company—Execution—Appointment of provisional Liquidator—Notice served on Sheriff before Execution complete—Duty of Sheriff—Charge of "costs of execution" on Proceeds—Sheriff's Costs only charged—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 269.

Under s. 269 of the Companies Act, 1929, where the goods of a company are taken in execution, but before their sale or the completion of the execution notice is served on the sheriff of an order for the winding-up of the company, or of the appointment of a Provisional Liquidator, the sheriff must deliver the goods or money seized to the liquidator, but the costs of the execution are to be a first charge on the goods or money so received, and the liquidator may sell the goods or a sufficient part thereof, for the purpose of satisfying that charge:—

Held, that the expression "the costs of the execution" referred only to the sheriff's costs, and did not include the creditors' costs of issuing and serving the writ of fieri facias which authorized the sheriff to levy the execution.

Appeal from a decision of the judge of the Bristol County Court.

On September 30, 1930, Textiles Français, Ld., recovered judgment against Woods (Bristol), Ld. (hereinafter called "the company"), for 14*l*. 7*s*. 2*d*. for goods sold and delivered and 6*l*. 4*s*. 6*d*. costs. On October 31 the plaintiffs in the action took out a writ of fieri facias directed to the sheriff of the County of Gloucester to levy execution on the goods of the company. On November 7, 1930, the Official Receiver for the district of Bristol served notice on the sheriff of Bristol that a winding-up petition had been presented against the company in the Gloucester County Court, and that he (the Official Receiver) had been appointed Provisional Liquidator. And he required the sheriff, in pursuance of s. 269 of the Companies Act, 1929, to deliver the goods taken in execution and to pay any money seized or received in part satisfaction of the execution or the proceeds of sale of any goods sold to him or his officer, after deducting the sheriff's costs of the execution. The sheriff accordingly delivered the goods seized to the Official Receiver. The solicitor for the plaintiffs then applied to the Official Receiver for payment of the sum of 2*l*. 2*s*., the plaintiffs' costs of the execution, but the Official Receiver refused to pay such costs.

The plaintiffs on April 30, 1911, moved for a declaration that the costs of the applicants of the execution were a first charge on the goods or money seized or received by the sheriff under the execution and delivered by him to the Official Receiver, and an order on the Official Receiver to pay the same.

His Honour Judge Parsons said that the motion raised a question of general importance on which there was no authority. The conclusion which he came to, though not without considerable doubt, was that the expression "the costs of the execution" in s. 269, sub-s. 1, meant only the sheriff's costs of the execution. He did not place any reliance on *In re Rogers* (1), which had been cited by the Official Receiver, as it did not deal with the point. He dismissed the motion with costs.

The applicants appealed.

A. E. Woodgate for the appellants. The judgment creditors are entitled to their costs of the execution under s. 269 of the Companies Act, 1929, and Order XLII., r. 15. In *In re William Long & Co.* (2) it was held that costs of an abortive execution cannot be added to a judgment debt so as to enable the creditor to present a petition in bankruptcy, but must be paid out of the goods seized. That case assists my argument. In *In re Rogers* (1) the only point decided was that the sheriff's costs of an interpleader issue were not "costs of execution." It is impossible to get execution without issuing a writ and serving it on the sheriff, who but for that writ would have no authority to levy execution; and, as in the case of an action, the costs of the execution necessarily include costs of the writ. The section speaks of "the" costs, not of "his" costs of the execution. These costs cannot be proved for in the liquidation of the company.

Roland Burrows for the respondent, the Official Receiver. The decision of the county court judge was right. The provisions of s. 269 of the Companies Act, 1929, have been imported into company law from bankruptcy practice, and the same rule applies in each case. The provision is found in s. 41 of the Bankruptcy Act, 1914, incorporating s. 11 of the Bankruptcy Act, 1890. A still earlier form of the section is s. 46 of the Bankruptcy Act, 1883. Both expressions "the costs of the execution" and "his costs of the execution" occur in these sections, and Cozens-Hardy M.R. in *In re Rogers* (1) treated them as referring to the sheriff's costs only. See Buckley on Companies, p. 870, and Companies (Winding-up) Rules, 1929, rr. 187, 188, providing for the taxation of the sheriff's costs of execution under s. 269, but no other costs.

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(1) [1911] 1 K. B. 641.
(2) (1888) 20 Q. B. D. 316.

EVE J. The short point raised on this appeal is whether the costs incurred by the judgment creditor's solicitor in issuing a writ of fi. fa. addressed to the sheriff are costs of the execution within the meaning of s. 269 of the Companies Act, 1929. It is not necessary for us, I think, to determine whether or not the two guineas, which is the amount involved, constitute costs of the execution. I should be inclined to say that speaking generally they do. The question is whether they are included in those costs of the execution which are covered by the provisions of s. 269. That section is directed to defining the duties of the sheriff relative to goods which he has taken in execution. The first sub-section of it provides "Where any goods of a company are taken in execution, and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the Sheriff that a provisional liquidator has been appointed"—I need not go further than that, because that is what took place in this case—"the sheriff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered." As I say, the question is whether the solicitor for the judgment creditor is entitled to the benefit of this charge to the extent of the two guineas or whatever be the proper amount allowed on taxation for the issue of the writ of fi. fa. The learned county court judge has held that those two guineas do not constitute part of the costs of execution which are entitled to a charge, and he has done so upon these lines. He reads first of all the provisions of s. 268, introduced into company law for the first time in this Act, which assimilates in similar circumstances the practice in dealing with insolvent companies to that followed in the case of an insolvent debtor under the Bankruptcy Act, that is, to allow the execution creditor no advantage unless the execution has been completed before the commencement of the winding-up. It deprives the judgment creditor of any advantage which he could claim by reason merely that he has put the sheriff into possession, unless the possession has been followed by the complete execution of the writ. Sect. 269 makes one exception in favour of the execution creditor; he is relieved from paying the costs of the execution, which are to be a first charge upon the goods or money handed over by the sheriff to the liquidator. Mr. Woodgate says the costs of the execution mean all the costs, not merely the sheriff's costs, and that they include the costs of the solicitor for the judgment creditor in issuing the writ. One has to examine the section to see whether in fact that is so. Some light is thrown upon the point by sub-s. 2, which provides that "where under an execution in respect of a judgment for a sum exceeding twenty pounds the goods of a company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid"; he shall retain the balance for fourteen days, and in the events therein mentioned pay over the balance to the liquidator. There is one small word in that sub-section which is different from the word which is used in the same collocation in a similar sub-section of the Bankruptcy Act. Under the Bankruptcy Act the sheriff shall deduct "his costs of the execution." In *In re Rogers* (1), where a question was raised whether interpleader proceedings initiated by the sheriff were included in his costs of the execution, the late Master of the Rolls, Lord Cozens-Hardy, in dealing with the two sub-sections of the section of the Bankruptcy Act, apparently treated the language "the costs of the execution" and "his costs of the execution" as referring to the same subject-matter. It was not, as Mr. Woodgate has pointed out, necessary to determine that point in *In re Rogers*, but I cannot help thinking that the Master of the Rolls would not have made those observations without noting that there was a difference between the language in the two sub-sections. However that may be, I think sub-s. 2 clearly limits the right of retention to the costs which the sheriff himself has incurred. It does not extend in my view to costs which he would be retaining for the benefit of somebody else. He might have deducted them but he could not have retained them. He ought to have been directed by this sub-section, if it was intended to apply to the costs of others, to retain his costs and to pay to the solicitor the costs of issuing the writ. We do not find that, and in my view the conclusion at which the learned county court judge arrived was right. Although these two guineas may for some purposes be well described as costs of the execution, the amount is not comprised in the costs for which a charge is reserved by this s. 269. The appeal will be dismissed with costs.

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(1) [1911] 1 K. B. 641, 646.

MAUGHAM J. I concur and have nothing to add.

Solicitors: *F. W. Perkins; Solicitor to Board of Trade.*

(1) [1911] 1 K. B. 641.

H. L. L.

BALLS BROTHERS, LIMITED *v.* SINCLAIR.

LUXMOORE J.

1931
May 13, 14.

[1931. B. 535.]

Landlord and Tenant—Covenant in Lease against Under-letting—Covenant by Tenant not to make Alterations or Additions—Consent of Landlord required—Not to be unreasonably withheld—Reinstatement at End of Term—Improvements—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 2.

By a lease dated April 2, 1930, certain premises were demised to the defendant for a term of years.

The lease contained covenants by the lessee (inter alia) (*a*) not to make any alteration or addition to the premises (except such as might from time to time have been authorized by the landlord in writing); (*b*) not to cut, maim or injure any of the walls or timbers thereof; and (*c*) not to assign or under-let the premises or any part thereof without the written consent of the landlord.

The lessee having contracted to sub-let the premises to A., and for this purpose desiring to carry out certain structural alterations (which included the alteration of the position of a staircase), in pursuance of the covenant in the lease, asked the landlord for his permission. The landlord refused his sanction to the suggested alterations except on certain conditions, which were unacceptable to the lessee.

The lessee thereupon threatened to carry out the alterations, and the landlord commenced an action for an injunction to restrain him from so doing.

Questions arose (1.) whether s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927, applied, and (2.) whether the landlord had under the circumstances unreasonably withheld his consent:—

Held, that the sub-section applied and must be read into the appropriate covenant, and that the landlord could not unreasonably withhold his consent if the alteration or addition sought to be made would in fact effect an improvement. The circumstances under which an alteration or addition constitutes an improvement considered.

Held also that, in the circumstances of the case, the withholding of consent on the part of the landlord was unreasonable, and the alteration could have been made without any further application to him.

ACTION.

The plaintiffs were the freeholders of certain premises known as Nos. 38 and 38A The Town, Enfield, in the county of Middlesex consisting of two shops on the ground floor and two flats on the first floor above the shops, the flats being approached by separate staircases. By a lease dated April 2, 1930, the plaintiffs demised to the defendant for the term of twenty-one years from March 25, 1930, the ground floor shop numbered 38A and the two flats on the first floor over the two shops at the rent therein mentioned. Among the covenants entered into by the defendant as tenant were covenants in the following terms—namely: "Clause 2 (3.) Within four months from the commencement of the term hereby created to expend the sum of two hundred pounds in the cost of labour and materials in making the alterations of and additions to the said demised premises according to plans and specifications to be approved and signed by the parties hereto and if so required to produce to the landlord's surveyor proper vouchers for such expenditure. (4.) Not to make any alteration or addition to the premises (save as aforesaid and except such as may from time to time have been authorised by the landlord in writing) nor to cut maim or injure any of the walls or timbers thereof nor to permit any of the aforesaid things to be done."

The defendant further covenanted by clause 2, sub-clause (14.), not to assign, underlet or part with the possession of the demised premises or any part thereof without the written consent of the landlord.

Both before and after the defendant took possession of the demised premises, negotiations took place between the defendant and the plaintiffs' surveyors with regard to the alterations and additions provided for under clause 2 (3.) of the lease.

The defendant submitted plans and specifications to the plaintiffs' surveyors, which however were not approved of by the plaintiffs themselves. The plaintiffs informed the defendant that the surveyors had no authority to approve of the plans and specifications on their behalf, and warned the defendant against proceeding with the work. The proposed plans included the putting up of a new shop front. Notwithstanding the warning the defendant went on with and completed the work in question in or about July, 1930.

No action was taken by the plaintiffs at the time.

In October, 1930, the defendant informed the plaintiffs that he was desirous of sub-letting the first floor of 38A, part of the demised premises, for a period of five years to an optician, and asked for their consent to the sub-letting and also to the making of certain structural alterations, which included the alteration of the position of a staircase. For this purpose he forwarded a plan and specification. This application was refused by the plaintiffs. Some correspondence ensued, and in December, 1930, the defendant offered in writing to make a payment towards the cost of certain alterations which the plaintiffs themselves wished to carry out if they would at once grant the licence required to alter the position of the staircase. To this the plaintiffs replied that they were not prepared to grant the licence asked for unless the defendant consented to make a larger payment than he had previously offered, and in addition agreed to pay their legal charges and expenses in connection with the preparation and completion of the licence.

The defendant replied to this, stating that the plaintiffs must know that they had no right to withhold the licence to the alterations which he wished to carry out until the sum asked for by the plaintiffs or anything at all had been paid towards the alterations which they (the plaintiffs) desired, that his (the defendant's) previous offer was withdrawn, and that unless the licence was received by a named date he would proceed with the alterations. He offered however to pay the plaintiffs' costs in connection with the licence.

The plaintiffs thereupon issued a writ, by which they sought an injunction to restrain the defendant from making any alteration or addition to the demised premises in breach as they alleged of the covenants in the lease, and they also claimed damages in respect of the breach of covenant committed in July, 1930.

Sir Gerald Hurst K.C. and *R. W. Turnbull* for the plaintiffs. The written consent of the landlords was not obtained to the alterations proposed by the defendant. Parts I. and II. of the Landlord and Tenant Act, 1927, must be read together. A question arises as to what are improvements referred to in

s. 19, sub-s. 2 (1): Woodfall on Landlord and Tenant, 22nd ed., p. 996.

J. Norman Daynes K.C. and *H. L. Williams* for the defendant. Part I. of the Act does not apply. There is no decision on the point, but it is submitted that the case of *Lilley & Skinner, Ld.* v. *Crump* (2) on the construction of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927 (1), is in our favour, and is strongly relied on.

[They referred to *In re Winfrey & Chatterton's Agreement* (3); *Houlder Bros. & Co.* v. *Gibbs.* (4)]

Sir Gerald Hurst K.C. in reply.

Luxmoore J. [His Lordship, after stating the facts substantially as set out above and pointing out that the claim for damages in respect of the work done by the defendant in July, 1930, had been withdrawn at the bar, continued:] In October, 1930, the defendant was minded to underlet one of the first floor flats. For this purpose he required the consent of the plaintiff company to the underletting and also to certain alterations in the structure to adapt it to the business of the proposed sub-tenant, who was an optician. Formal application for consent was made. The proposed alteration, which included the provision of a new staircase, was obviously an alteration within the covenant contained in clause 2, sub-clause 4, of the lease. The answer to the application was that the plaintiffs were not prepared to grant the licence. Some discussion and correspondence took place, and in the result the licence was refused. [His Lordship referred to the correspondence mentioned above :] Owing to the delay arising from the correspondence with regard to the licence, the proposed sub-tenant of the defendant no longer requires the premises, and the question therefore whether the alterations could be made or not is of no moment. The real question is, who should pay the costs of the action ?

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(1) Landlord and Tenant Act, 1927, s. 19, sub-s. 2: "In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed."

(2) (1929) 73 Sol. J. 366.

(3) [1921] 2 Ch. 7, 10.

(4) [1925] Ch. 575, 583.

The legal position, if it rested solely on the covenants of the lease, was that the defendant, having covenanted not to make alterations without the consent of the landlord, would commit a breach of that covenant if he made any alteration without that consent being obtained. But it does not rest there. Mr. Norman Daynes relied on the provisions of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927. [His Lordship read the sub-section.] (1) He argued that this sub-section is applicable to and must be read into any lease where there is a covenant which would have the effect of preventing the making of any improvement, if improvement were required to be made. It is obvious that the phrase "covenants against improvements" is not a technical description usually accepted as describing covenants of a particular class. Personally I have never heard of "a covenant against making improvements" *totidem verbis* nor have counsel engaged in the case. Sir Gerald Hurst argued that the sub-section must be read strictly as being applicable only to "covenants against improvements" in express terms on the ground that the sub-section was inserted as ancillary to the provisions with regard to contracting out of the Act contained in the first part of the Act.

I cannot think this is the right construction. Part I. of the Act deals with compensation for improvements and goodwill in respect of a particular class of property. Part II. deals with general amendments of the law of landlord and tenant. Sub-s. 1 of s. 19 (which is to be found in Part II.

(1) See note (1) ante, p. 328.

of the Act) provides for a particular class of covenants generally described as and well recognized under the description of "repairing covenants," and sub-s. 2 of that section appears to me to be intended to provide for another class, which are described in the sub-section as "covenants against making improvements." In my view what is being dealt with in the sub-section is a particular class of covenants which were in existence at the time of the passing of the Act, and which would in fact restrict the making of improvements. An alteration or addition may be an improvement or the reverse. If the alteration or addition sought to be made in fact effects an improvement, it comes within the sub-section.

I have thought it convenient to state my own view of the construction of the sub-section apart from any authority on the point. I find however that my own view is supported by the decision of Rowlatt J. in the case of *Lilley & Skinner, Ld.* v. *Crump*. (1) The action was brought by the plaintiffs, who were tenants of certain premises in Oxford Street and Stratford Place, against their landlord for a declaration that the landlord was not entitled unreasonably to withhold consent to the making of openings in a party wall between the premises in Oxford Street and Stratford Place. There was a covenant in the lease under which the plaintiffs held against making alterations and additions without the consent of the landlord, and there was also an absolute covenant against the cutting or maiming any of the main walls. The plaintiffs contended first that the Landlord and Tenant Act, 1927, s. 19, sub-s. 2, in effect inserted a proviso into the lease that the consent to the making of alterations and additions which constituted improvements could not be unreasonably withheld, and secondly, that the defendant must in the circumstances be taken to have unreasonably withheld consent. Counsel for the defendant contended (1.), that the plaintiffs were not entitled to the declaration, because what was sought to be done was within the absolute covenant not to cut or maim the main walls; and (2.) that on its strict construction, s. 19, sub-s. 2, of the Act did not apply

(1) 73 Sol. J. 366.

at all. That means I think that there was no covenant in actual words "against making improvements." Rowlatt J. said that the two openings would be of special advantage to the plaintiffs, and could not if they undertook to reinstate be a disadvantage to the defendant. The point was whether the work proposed was merely an alteration not to be done without consent or a cutting and maiming not to be done on any account. He considered that the matter did not fall within the scope of the absolute covenant, but was an alteration which could be made with consent. He held that the plaintiffs were entitled to the declaration sought.

That decision involves the construction of the sub-section, and is binding on me. The view I have already expressed as to construction agrees with my brother Rowlatt's decision. In these circumstances I hold that on the true construction of the Landlord and Tenant Act, 1927, I must read the provision contained in sub-s. 2 of s. 19 into the covenant contained in sub-clause 4 of clause 2 of the lease, and consequently the landlord cannot withhold consent unreasonably to the making of an alteration or addition which constitutes an improvement.

First however I must be satisfied that the matter required to be done is in fact an improvement. From what point of view am I to consider this? From the point of view of the tenant or of the landlord or of both? I think the answer to the question will be found in the sub-section itself. The sub-section provides in effect that the landlord may say to the tenant, who asks for leave to make an improvement: "I shall not give my consent to the alteration you are making unless and until you give an undertaking to reinstate at the end of the term." That shows that the question whether it is an improvement or not may be considered from the point of view of the tenant alone. I have heard a considerable amount of expert evidence which is in agreement to this extent that, so far as the tenant is concerned, what he sought to do would be an obvious improvement. The expert opinion so far as the landlords are concerned is also in agreement that the alteration proposed would not necessarily be for the benefit of the landlords. In these circumstances, if it is plain that, so far as the tenant is concerned, what is suggested will constitute an improvement; then, although it is not or may not be so from the landlords' point of view, the landlords will be amply protected by the undertaking of the tenant to reinstate at the end of the term.

The refusal of the landlords, when requested to consent to the alterations, was, it was said, not unreasonable, because there was no explanation by the tenant of the purpose for which he wanted to make the alteration or that it would be an improvement from his point of view; nor did he refer to the Act of 1927 or offer to reinstate at the end of the term. I do not think it was incumbent on the tenant to point out that what was proposed would be an improvement, nor was it necessary for him to call attention to the Act, because the landlords must be presumed to have known of it. Nor was it necessary for the tenant to make an offer to reinstate, because the sub-section provides that this is something which the landlords can insist on as a term of their consent without running the risk of being held to have acted unreasonably.

In the present case, for the reasons I have stated, I am satisfied that the withholding of consent of the plaintiffs was unreasonable. Further, I should point out that Mr. Balls, a director of the plaintiffs, in the course of his evidence said that if the 25*l.* referred to in the correspondence had in fact been paid, the consent would have been given. I think the defendant's contention is correct. It follows that in my judgment the alteration could in the circumstances have been made without any further application to the plaintiffs. If that is so, the plaintiffs' claim to an injunction could not succeed. The action therefore must be dismissed with the usual consequences.

Solicitors: *Robinson & Blaber; Geo. Brown, Son & Vardy.*

A. R. T.

LUXMOORE J.

1931

June 4; July 16.

In re HAYDEN.

PASK *v.* PERRY.

[1931. H. 231.]

Will—Construction—Gift of Real Estate to a Class "or their issue"—Estate Tail—"Or" to be read "And"—Words of Limitation, not of Substitution.

In construing a devise of real estate to a class of persons "or their issue," the words "or their issue" must be read as words of limitation and not of substitution, the word "or" being construed to mean "and."

Therefore a devise of real estate to be equally divided between the sisters of C. "or their issue" was held to confer upon each of the sisters of C., of whom there were three, an estate tail in one undivided third part.

Parkin v. *Knight* (1846) 15 L. J. (Ch.) 209 followed and applied.

In re Clerke [1915] 2 Ch. 301 and *In re Whitehead* [1920] 1 Ch. 298 distinguished.

ADJOURNED SUMMONS.

Joseph Hayden, by his will dated December 3, 1875, gave and bequeathed all rents arising from time to time of his freehold property therein specifically described unto his daughter Charlotte Hayden for her own use and benefit and at her death the said freehold property was to be equally divided between her issue but if no issue then "between her sisters or their issue." Then there was a similar gift of the rents arising from time to time of other freehold property of the testator also specifically described in the will unto his daughter Sarah Hayden for her own use and benefit and at her death the last mentioned property was to be equally divided between her issue but if no issue then "between her sisters or their issue." After making some provision for his daughter Mary Anne Perry and some of her children and giving all his household furniture to Charlotte Hayden, the testator directed that the residue of his personal estate should be paid to his daughter Emma Hayden, and appointed Charlotte Hayden and one Charles Woodbridge executrix and executor respectively of his will.

The testator died on November 1, 1877, leaving his four daughters named in his will him surviving. Charlotte Hayden died on March 14, 1921, without having been married. Mary Anne Perry died on December 9, 1887; Sarah Hayden died on July 14, 1924; and Emma Hayden died on September 11, 1911. The three last mentioned daughters of the testator married, but only Mary Anne Perry had issue. She had seven children, some of whom married and had children and grandchildren.

The defendant Joseph Hayden Perry was the eldest son and heir at law of Mary Anne Perry. At the death of Charlotte Hayden there were living one only of her three sisters—namely, Sarah Pask, and five children and eighteen grandchildren of her deceased sister Mary Anne Perry: and since the death of Charlotte Hayden two more grandchildren and two great-grandchildren of Mary Anne Perry were born. At the death of Sarah Pask there were living five children and nineteen grandchildren of Mary Anne Perry, and since the death of Sarah Pask two great-grandchildren of Mary Anne Perry were born.

On January 20, 1931, this originating summons was taken out by the plaintiffs, who were the present trustees of the will of the testator and also the personal representatives of each of his deceased daughters Charlotte Hayden, Sarah Pask and Emma Perry. The questions raised were: first, whether the two specifically devised properties were vested upon the statutory trusts in the plaintiffs or the Public Trustee; secondly, (*a*) whether each of the three sisters of Charlotte Hayden deceased took an estate tail in remainder expectant on her death in one undivided third part of the first devised property; (*b*) whether each of the three sisters of Sarah Pask deceased took an estate tail in remainder expectant on her death in one undivided part of the secondly devised property; and (*c*) whether on the death without issue (and without having disentailed) of any of such sisters, the undivided third or thirds in which she took an estate tail reverted to the testator's estate and descended to his heir at law as upon an intestacy. If the Court should answer those questions negatively, then the following further questions arose: whether on the death of Charlotte Hayden, the first devised property became divisible between her sister Sarah Pask and the issue of her deceased sister Mary Anne Perry and the personal representatives of her deceased sister Emma Perry; whether upon the death of Sarah Pask, the issue of her deceased sister Mary Anne Perry became entitled to the whole of the secondly devised property or whether the same became divisible between such issue and the personal representatives of her deceased sister Charlotte Hayden and the personal representatives of her deceased sister Emma Perry: and those questions involved other questions concerning the respective interests of the children and remoter issue of Mary Anne Perry and the personal representatives of the other deceased sisters in the first and secondly devised properties respectively.

By an order made by Farwell J. on April 28, 1931, in answer to the first question raised by the summons, it was declared that the two properties in question were vested in the plaintiffs upon the statutory trusts.

At the hearing before Luxmoore J. of the remaining questions raised by the summons, the defendants other than the defendant Joseph Hayden Perry were appointed to respectively represent the children, grandchildren and great-grandchildren of Mary Anne Perry.

E. G. Eardley-Wilmot for the plaintiffs.

Sir Arthur Underhill for Joseph Hayden Perry. Upon the true construction of the gifts over on the respective deaths of Charlotte Hayden and Sarah Pask, each of her three sisters took an estate tail in one undivided third part of the properties first and secondly devised by the will respectively. The case is governed by *In re Clerke.* (1) *In re Whitehead* (2) is distinguishable from the present case. There, the gift was to the testator's brothers and sister F. W. J. E. and X. "or their heirs in equal shares and proportions." There were in that case special circumstances which guided Sargant J. to decide that the gift was substitutional: first, it was a conjoint gift of realty and personalty, and secondly, inasmuch as the gift of the personalty was substitutional, the same

(1) [1915] 2 Ch. 301.

(2) [1920] 1 Ch. 298.

construction was given to the gift of the realty: and thirdly, one of the devisees mentioned in the gift was known to the testator to be dead when he made his will.

R. R. Formoy for the defendant Mary Evelyn Sustins representing great-grandchildren. The gifts over here must be construed as gifts to issue by way of substitution. The words are words of distribution: *Wingfield* v. *Wingfield* (1); *Keay* v. *Boulton* (2); and Jarman on Wills, 7th ed., p. 1288.

Horace Freeman for the defendant Alfred W. Perry representing the two classes of grandchildren living at the respective deaths of the two life tenants.

G. Ivor Phillips for the defendant Frederick W. S. Timms representing the two classes of grandchildren who predeceased the respective life tenants.

F. E. Skone James for the defendant Charlotte Perry, a daughter of Mary Anne Perry representing the two classes of children living at the deaths of the respective life tenants.

Cur. adv. vult.

July 16. LUXMOORE J. The question to be determined is what is the meaning and effect of a gift over in the will of one Joseph Hayden relating to freehold property at Pinner after the death of a named person to be equally divided "between her sisters or their issue."

Is the gift over substitutional, or did it confer on each of the three sisters of the tenant for life an estate tail in an undivided third part of the property expectant on the death of the tenant for life?

I need not refer to the facts in any detail; it is sufficient to state that the will was dated December 3, 1875, and that it took effect on the testator's death on November 1, 1877. The first tenant for life under the will was the testator's daughter Charlotte. She died on March 14, 1921, without ever having been married. The testator had three other daughters, all of whom survived him—namely, Sarah, Mary Anne and Emma. All these daughters married, but only one of them, Mary Anne, had issue. She had seven

(1) (1878) 9 Ch. D. 658.

(2) (1883) 25 Ch. D. 212.

children, some of whom married and had children and grandchildren. These children and grandchildren are represented in these proceedings. The defendant Joseph Hayden Perry is the eldest son and heir at law of the testator's daughter Mary Anne. The defendant Alfred William Perry is a child of Joseph, and, therefore, a grandchild of Mary Anne, while the defendant Mary Evelyn Sustins is a great-grandchild of Mary Anne. The defendant Frederick Whiting Samuel Timms is the heir at law and next of kin of two other grandchildren of Mary Anne, both of whom died before the tenant for life.

The question to be determined is whether the words "or issue" appearing in the gift over are to be read as words of limitation or as words of substitution. In order to read them as words of limitation it is necessary to read "or" as "and." Sir Arthur Underhill, who appeared for the defendant Joseph Hayden Perry, relied upon a decision of Eve J. in *In re Clerke* (1) in support of his contention that on its true construction the gift conferred estates tail on each of the testator's three daughters in an undivided third part of the property expectant on the death of the tenant for life. In that case the testator, who died in 1870, gave certain freehold property to his son Holt Clerke for life, and directed that on his death the property should revert to his issue as he should by his will appoint, and in default of issue surviving Holt Clerke then to revert to his brother Shadwell Henry Clerke or his issue. Eve J. held that this gift to Shadwell Henry Clerke or his issue gave to Shadwell an estate tail, the words being words of limitation and not of substitution. The real question argued in that case was whether the rules laid down in *Read* v. *Snell* (2), that a devise to "'A' or his heirs" gives "A" an estate in fee simple, and in *Harris* v. *Davis* (3) and *Greenway* v. *Greenway* (4) that a devise to "'A' or the heirs of his body" gives "A" an estate tail, had been altered in the case of wills coming into operation since the date of the Wills Act.

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(1) [1915] 2 Ch. 301.

(2) (1743) 2 Atk. 642.

(3) (1844) 1 Coll. 416.

(4) (1860) 2 De G. F. & J. 128.

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Eve J. considered the comments in the well known text-books on Wills by Mr. Jarman, Mr. Vaughan Hawkins and Mr. Theobald, and held that, notwithstanding the force of those comments, and although the rule had survived the mischief it was originally forged to avert and was no longer necessary, yet he was unable to hold that it did not survive, and accordingly he held that Shadwell Henry Clerke took an estate tail.

Mr. Formoy, on behalf of the defendant Mary Evelyn Sustins, contended that the decision of Eve J. ought not to be followed in this case, first, because Sargant J. had expressed doubts with regard to it, and secondly, because the gift in this case was different from that in *In re Clerke.* (1) In the latter case the gift was to one person or his issue, while in the present case the gift is to a class of persons or their issue. The case on which he relied is *In re Whitehead.* (2) In that case the testatrix, who died in 1895, gave her residuary personalty and realty, after the death of an annuitant, to her brothers and sister, Francis, William, John, Ellen and Joseph " or their heirs in equal shares and proportions." The brother John was dead, to the knowledge of the testatrix, at the date of the will. It was admitted that the words " or their heirs " must be construed as substitutionary so far as the residuary personalty was concerned. The question was whether they should be construed differently with regard to realty. Sargant J. said (3) : " Apart from authority, there could, I think, be no doubt as to the proper answer to give to this question. The words ' or their heirs ' are on their plain primary meaning substitutionary. They can be treated as words of limitation only by doing violence to the language by altering the word ' or ' into ' and.' And further, the result of this alteration would be to render the three words in question superfluous and ineffective, since without them the words of gift are, under s. 28 of the Wills Act, 1837, amply sufficient to give the brothers and sister the fee simple or other the whole estate or interest which the testatrix had

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(1) [1915] 2 Ch. 301.

(2) [1920] 1 Ch. 298.

(3) [1920] 1 Ch. 302.

LUXMOORE J.

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power to dispose of." He went on to deal with the cases referred to before Eve J. and with Eve J.'s own decision in *In re Clerke* (1), and pointed out that, in his view, the real objection to construing the words as words of limitation is the change of the plain meaning of the word "or" into "and" without any adequate cause as the law now stands, and he proceeded (2): "To my mind this last objection is the determining one, and, with much deference to the view of Eve J., I cannot help declaring my own preference for the view of the text-writers I have mentioned, at any rate so far as regards a devise to 'A. or his heirs.' Had I to decide a case precisely similar to that before Eve J., I might perhaps be constrained to follow his decision for the sake of uniformity, leaving the matter to be reconsidered now or at some future period by a higher tribunal. But as the matter stands it is open to me to follow my own opinion. And this is particularly so in the present case because of two special circumstances which are present here. In the first place the gift here is a conjoint gift of realty and personalty. Undoubtedly the gift of personalty must be construed as being substitutionary, and this is a strong reason for construing the gift of realty in the same way. And further, one of the devisees mentioned in the gift was known to the testatrix to be dead at the date of the will, so that it is hardly possible that in this case at least the testatrix meant the gift to be other than substitutionary."

I appreciate the force of the criticism of Sargant J., but I doubt whether that criticism, or the decision, either in the case before Sargant J. or in that before Eve J., really applies to the present case. In the present case the gift is to a class or their issue. This is certainly different from a gift to a named person or his issue, or to a number of named persons or their issue. The testator has provided that after the death of Charlotte and a failure of her issue, the freehold property is to be equally divided between her sisters or their issue. He has not said what is to be done when a sister dies without issue. Take the events that happened: one sister had issue,

(1) [1915] 2 Ch. 301.

(2) [1920] 1 Ch. 303-304.

the others had no issue ; the testator does not say that the issue are to take such shares as their parents would have taken. There is nothing to suggest how the issue are to take inter se. Quite apart from the rule discussed by Eve J. and Sargant J. in the cases to which I have referred, it seems to me that there is, in the present case, an obvious reason why " or " should be read as " and," for by so doing you make sense of the words.

I think the case is really covered by the decision in *Parkin* v. *Knight.* (1) In that case the gift was of the testator's residuary estate, which consisted of realty and personalty, to his brother Ephrahim to assist him in bringing up his nephews, and when the youngest nephew attained twenty-one the testator directed that the property was to be equally divided amongst his nephews, or their lawful issue, share and share alike. Shadwell V.-C. held that each nephew took an estate tail in an undivided fourth part.

I hold that on the true construction of the testator's will each of the three sisters of Charlotte took an estate tail in an undivided third share of the freehold property of which the testator's daughter Charlotte was tenant for life.

The will also contained a devise of further freehold property to the testator's daughter Sarah Hayden for life with remainder to her issue, and, in default of issue, he directed that that property was to be divided between " her sisters or their issue." The same construction must be applied to this gift, and I consequently hold that each of the three sisters of Sarah Hayden took an estate tail in an undivided third share of the freehold property of which the testator's daughter Emma Hayden was tenant for life ; and lastly, that on the death, without issue (and without having disentailed) of any of such sisters, the undivided third or thirds in which she took an estate tail, reverted to the testator's estate and descended to his heir as on an intestacy.

Solicitor for all parties : *Thomas Vincent Howells.*

(1) 15 L. J. (Ch.) 209.

A. R. T.

In re CURWEN.

CURWEN *v.* GRAHAM.

LUXMOORE J.

1931
July 11.

Settlement—Vesting Deed made pursuant to the provisions of the Settled Land Act, 1925*—Statement that Trustees, executing the Deed, were Trustees of the Principal Settlement—No Reference to fact that they were Trustees of a Compound Settlement—Description of Trustees sufficient—Vesting Deed Valid—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 5, *sub-ss.* 1, 3; *s.* 110, *sub-s.* 2; *Second Schedule, para.* 1, *sub-paras.* 1, 2.

A vesting deed, executed with the intended object of giving effect to the provisions of the Settled Land Act, 1925, with regard to the vesting of settled land in a tenant for life, contained a statement that the trustees, who were executing the deed, were trustees of the principal settlement, but it contained no reference to the fact that they were trustees of a compound settlement, consisting of the principal settlement and other documents:—

Held, that the trustees were sufficiently described, and that the vesting deed was a valid and effectual principal vesting deed, made pursuant to the Settled Land Act, 1925, in respect of the land comprised in the compound settlement, constituted by the various documents.

By a settlement dated September 5, 1892, certain freehold property was settled to the use of Chaloner Curwen for life with remainder to his first and other sons in tail male in strict settlement, and it contained a power to the first tenant for life to appoint a life or less estate to any widow who survived him. On October 12, 1892, Chaloner Curwen, in view of his then intended marriage to the plaintiff, executed a deed poll appointing a life interest to the plaintiff. There were two children of the marriage, one of whom was the first tenant in tail male. On March 3, 1897, the first tenant for life died, and on his death the plaintiff became entitled to an estate for her life in the settled property. On November 2, 1914, the tenant in tail male, who had attained the age of twenty-one years, executed a disentailing deed, and on the same date a re-settlement was made by him in the usual form of a strict settlement. The plaintiff joined in the disentailing deed for the purpose of enabling certain charges to be made in priority to her life estate which she had under the settlement and appointment of 1892, and her original life estate was restored. By a vesting deed, dated July 1, 1926, and made between the then trustees of the settlement of 1892 for the purposes of the Settled Land Act, 1925, of the one part and the plaintiff of the other part, it was witnessed: (1.) That the vesting deed was executed for the purpose of giving effect to the requirements of the Settled Land Act, 1925, and at the plaintiff's request as tenant for life in possession of or a person having the powers of a tenant for life over or in relation to the property therein mentioned under the settlement of 1892 and the appointment; (2.) that the trustees thereby declared the property described in the deed (being the property then subject to the settlement of 1892 and the documents subsequent in date thereto which were thereinbefore mentioned) and all other properties which were then by any means subject to the subsisting limitations or trusts of the settlement of 1892 and to which that declaration was applicable were vested for the legal estate therein for the plaintiff; (3.) that the plaintiff should stand possessed of the premises upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held from time to time under the settlement of 1892 and the appointment or otherwise; (4.) that the trustees were the trustees of the settlement of 1892 for the purposes of the Settled Land Act, 1925; and (5.) that the settlement of 1892 did not contain any power of appointment of a new trustee or new trustees thereof, and the statutory power was applicable.

The defendants were also, by virtue of s. 31, sub-s. 1, of the Settled Land Act, 1925, trustees for the purposes of the Act, of the compound settlement, constituted by the settlement of 1892, the deed of appointment under it, the disentailing deed of November 2, 1914, and the resettlement of the same.

On the sale of a portion of the estate, subject to the settlement, objection was taken to the validity of the vesting deed on the ground that it contained no reference to the fact that the defendants were trustees of the compound settlement, but only referred to them as trustees of the settlement of 1892.

This summons was then taken out by the plaintiff, and it raised the question whether the deed of July 1, 1926, was a valid and effectual principal vesting deed.

C. A. J. Bonner for the plaintiff. The vesting deed is invalid. It ought to have been executed by the trustees of the compound settlement as such. It is in fact executed by the trustees of the settlement of 1892, which is not the relevant document. Under s. 13 of the Settled Land Act, 1925, the tenant for life cannot pass the legal estate until a valid vesting deed has been executed. Sect. 5 indicates the particulars and statements to be contained in the vesting deed, and this vesting deed does not comply with the requirements of that section. The compound settlement is the relevant settlement, and the vesting deed does not indicate the names of the persons who are the trustees of that settlement. Where a compound settlement exists the trustees of that settlement for the purposes of the Act are the proper persons to execute the principal vesting deed: *In re Cradock's Settled Estates* (1) and *In re Cayley and Evans' Contract.* (2) It is also to be noted that under the proviso to s. 100, sub-s. 2, a purchaser is concerned to see that the trustees of the settlement are the properly constituted trustees of the settlement.

W. J. Whittaker for the defendants. This is a perfectly good vesting deed. Nowhere in the Settled Land Act, 1925, is there a definition of a compound settlement. The vesting deed contains all the particulars required by s. 5, which is the vital section. There is nothing in that section nor in para. 1 of Sch. 2 to the Act to suggest that every deed constituting the settlement under which the land is held at the date of the vesting deed must be referred to. The trustees of the settlement of 1892 are of legal necessity the trustees of the compound settlement constituted by that and the subsequent instruments: see s. 31, sub-s. 1, of the Act, and being named in the vesting deed as trustees of the resettlement, s. 5 is satisfied. *In re Ogle's Settled Estates* (3) shows that the

(1) [1926] Ch. 944.

(2) [1930] 2 Ch. 143.

(3) [1927] 1 Ch. 229.

word settlement in general in the Act does not mean a document or a number of documents, but a legal position brought about by a document or documents. The point in this case did not arise in *In re Cradock's Settled Estates* (1) and *In re Cayley and Evans' Contract.* (2) The Court in those cases was not concerned with the question what particulars should be contained in a vesting deed, but with the question what persons should make that deed. Here admittedly the proper persons have made the deed.

LUXMOORE J. The question I have to determine is whether a vesting deed which was executed with the intended object of giving effect to the provisions of the Settled Land Act, 1925, with regard to the vesting of the settled land in the tenant for life is a valid vesting deed or not.

It is said that the vesting deed is invalid because it contains no reference to the fact that the three gentlemen named as trustees, and who are the persons executing the deed are, in fact, trustees of the compound settlement, but it only refers to them as trustees of the settlement of 1892. The vesting deed was executed under the provisions of the Act of 1925. The Act provides that where there is a subsisting settlement at the date of the Act the provisions which are set out in the Second Schedule of the Act shall apply. Those provisions, so far as they are material, are: " (1.) A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument. (2.) As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall at the cost of the trust estate, execute a principal vesting deed (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner, and including themselves if they are the statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid, and, if more than one, as joint tenants." Sect. 5 is the section which provides as to the contents of the vesting deed. Sub-s. 1 provides: "(1.) Every vesting deed for giving effect to a settlement or for conveying settled land to a tenant for life or statutory owner during the subsistence of the settlement (in this Act referred to as a 'principal vesting deed') shall contain the following statements and particulars, namely: (*a*) a description, either specific or general, of the settled land; (*b*) a statement that the settled land is vested in the person or persons to whom it is conveyed or in whom it is declared to be vested upon the trusts from time to time affecting the settled land; (*c*) the names of the persons who are the trustees of the settlement; (*d*) any additional or larger powers conferred by the trust instrument relating to the settled land which by virtue of this Act operate and are exercisable as if conferred by this Act on a tenant for life; (*e*) the name of any person for the time being entitled under the trust instrument to appoint new trustees of the settlement." Sub-s. 3 provides: "A principal vesting deed shall not be invalidated by reason only of any error in any of the statements or particulars by this Act required to be contained therein." It seems to me that all that s. 5 says is that the vesting deed shall contain certain statements and particulars. What are the statements and particulars that it is to contain? First, there is to be "a description, either specific or general, of the settled land." There is no difficulty here with regard to that. Then the section requires: "A statement that the settled land is vested in the person or persons to whom it is conveyed or in whom it is declared to be vested upon the trusts from time to time affecting the settled land." That statement is contained in the vesting deed. Then: "The names of the persons who are the trustees of the settlement." The names of the trustees are set out. It is true that a description of them has been added; in clause 4 of the vesting deed it says: "The trustees are the trustees

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(1) [1926] Ch. 944.
(2) [1930] 2 Ch. 143.

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1931

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of the settlement of 1892 for the purposes of the Settled Land Act, 1895." That is a perfectly true statement, and as a result of their being trustees of the settlement of 1892 they are also trustees of the compound settlement that exists and is constituted by the various documents to which I have already referred for the purposes of the Act. There is nothing in s. 5 that says that they must state the actual documents which constitute the settlement of which they are trustees. If the persons stated in the vesting deed to be the trustees are in fact the trustees of the compound settlement, that seems to me, as far as s. 5 is concerned, sufficient.

It is also said that s. 110 shows the deed to be bad. Sub-s. 2 enacts as follows: " A purchaser of a legal estate in settled land shall not, except as hereby expressly provided, be bound or entitled to call for the production of the trust instrument or any information concerning that instrument or any ad valorem stamp duty thereon, and whether or not he has notice of its contents he shall, save as hereinafter provided, be bound and entitled if the last or only principal vesting instrument contains the statements and particulars required by this Act to assume that: (*a*) the person in whom the land is by the said instrument vested or declared to be vested is the tenant for life or statutory owner and has all the powers of a tenant for life under this Act, including such additional or larger powers, if any, as are therein mentioned; (*b*) the persons by the said instrument stated to be the trustees of the settlement, or their successors appearing to be duly appointed, are the properly constituted trustees of the settlement; (*c*) the statements and particulars required by this Act and contained (expressly or by reference) in the said instrument were correct at the date thereof; (*d*) the statements contained in any deed executed in accordance with this Act declaring who are the trustees of the settlement for the purposes of this Act are correct; (*e*) the statements contained in any deed of discharge, executed in accordance with this Act, are correct." That is followed by a proviso: " Provided that, as regards the first vesting instrument executed for the purpose of giving effect to: (*a*) a settlement subsisting at the commencement of this Act; . . . . a purchaser shall be concerned to see—(i.) that the land disposed of to him is comprised in such settlement or instrument; (ii.) that the person in whom the settled land is by such vesting instrument vested, or declared to be vested, is the person in whom it ought to be vested as tenant for life or statutory owner; (iii.) that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees of the settlement." If there is a compound settlement, that is the relevant settlement for the purposes of the vesting deed (see the proviso at the end of s. 1, sub-s. 1), and a purchaser is entitled to be satisfied that the persons stated in the vesting deed to be the trustees of the settlement are the trustees of that compound settlement, but there is no provision in s. 110 that the vesting deed should contain a statement of what document or documents the particular settlement under which the trustees are acting consists. All that the Act requires is that the persons who are to execute the vesting deed should be in fact the trustees of the relevant settlement whatever it is. So far as I can see, there is nothing in the Act which makes the vesting deed in this case an invalid deed.

My attention has been called to various decisions, a decision of Astbury J. in *In re Cradock's Settled Estates* (1) and Bennett J. in *In re Cayley and Evans' Contract*. (2) Neither of these cases deal with the point I have to decide in this case. In neither case was the learned judge considering the validity of the instrument having regard to what was stated in the body of the instrument. The question in each case was, who were the persons who ought in the particular case to execute a vesting deed? That is not the question I have to determine. Everybody admits the persons who have executed the vesting deed in this case are, in fact, those persons who ought to execute the vesting deed, and the tenant for life is the person in whose favour they want to execute it. In those circumstances I see no reason to say the vesting deed in this case is an invalid deed, and I answer the question

(1) [1926] Ch. 944. (2) [1930] 2 Ch. 143.

raised by the summons by stating that the vesting deed dated July 1, 1926, is a valid and effectual principal vesting deed executed or made pursuant to the Settled Land Act, 1925, and in respect of the land comprised in the settlement constituted by the various documents which are set out in the title to the summons.

Solicitors for all parties: *Lawrence, Graham & Co.*

P. J. B.

FARWELL J.
1931
July 21, 22.

ATTORNEY-GENERAL *v.* WEEKS.

[1930. A. 3172.]

Dentist—"*Dentist* 1921"—*No Degree or Diploma—Use of Title* "*Dental Surgeon*"—*Implication—Professional Status or Qualification—Dentists Act*, 1878 (41 *&* 42 *Vict. c.* 33), *ss.* 3, 5, 6—*Dentists Act*, 1921 (11 *&* 12 *Geo.* 5, *c.* 21), *ss.* 3, 4.

Although a "Dentist 1921" (i.e., a dentist without degree or diploma admitted to the dentists register of 1878 under the Dentists Act, 1921, s. 3, sub-s. 1 (*a*), in virtue of pre-1921 practice of dentistry) may apparently practise "dentistry and dental surgery" under s. 5 of the Dentists Act, 1878, he may not call himself a "dental surgeon," though he can use the term "dentist" or "dental practitioner" under s. 4 (*a*) of the 1921 Act.

The use of the term "dental surgeon" in such a case is reasonably calculated to suggest either that the "Dentist 1921" has the "professional status" of a "Dentist 1878" (i.e., a dentist without degree or diploma registered under the 1878 Act, s. 6 (*c*), in virtue of pre-1878 practice of "dentistry or dental surgery") or that he has the "professional qualification" of a degree or diploma.

The use of the term by a "Dentist 1921" is therefore forbidden by s. 4 (*b*) of the 1921 Act.

WITNESS ACTION.

The defendant was a dentist at Norwich. He was admitted to the Dentists Register, 1878, under s. 3, sub-s. 1 (*a*), of the Dentists Act, 1921, in virtue of his previous practice, and was registered as "Dentist 1921." He then became entitled under s. 4 to use the description of "dentist or dental practitioner" but not to use "any title or description reasonably calculated to suggest that he possesses any professional status or qualification other than a professional status or qualification which he in fact possesses and which is indicated by particulars entered in the register in respect of him."

The defendant used the title " dental surgeon " and claimed the right to do so.

On November 27, 1930, the Attorney-General at the relation of the British Dental Association commenced this action for a declaration that the defendant was not entitled to use the title " dental surgeon " and for an injunction and costs.

As by s. 18 the 1921 Act has to be construed as one with the Dentists Act, 1878, it was necessary to consider the 1878 Act.

Before the Dentists Act, 1878, any one could practise dentistry under any description he chose. The 1878 Act, passed on July 22, 1878, to make provision " for the registration of persons specially qualified to practise as dentists in the United Kingdom " did not prevent persons practising as dentists but imposed registration as a condition of their calling themselves dentists or dental practitioners or recovering fees.

Sect. 3 provides that from and after August 1, 1879, a person shall not be entitled to take or use the name or title of " dentist " (either alone or in combination with any other word or words), or of " dental practitioner," or any name, title, addition, or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act. A penalty is imposed for breach of this provision, and the section does not apply to legally qualified medical practitioners.

Sect. 4 provides that a person who takes or uses the designation of " any qualification or certificate in relation to dentistry or dental surgery " which he does not possess is liable to a fine.

Sect. 5 provides that a person registered under this Act shall be entitled to practise " dentistry and dental surgery " in any part of Her Majesty's dominions, and from and after August 1, 1879, a person shall not be entitled to recover any fee or charge, in any Court, for the performance of any dental operation, or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner.

The " qualification necessary for registration " is contained in s. 6, which provides that any person who—

(*a*) Is a licentiate in dental surgery or dentistry of any of the medical authorities ; or,

(*b*) Is entitled as hereinafter mentioned to be registered as a foreign or colonial dentist ; or,

(*c*) Is at the passing of this Act bona fide engaged in the practice of " dentistry or dental surgery," either separately or in conjunction with the practice of medicine, surgery, or pharmacy,

shall be entitled to be registered under this Act.

Sect. 7 provides that before registration the applicant must produce the document conferring his " licence or qualification " with a proviso that no person shall be registered in virtue of previous practice of dentistry unless he produces the declaration in the Schedule to that effect.

Sects. 8, 9, and 10 contain provisions as to the registration of colonial and foreign dentists with certificates recognized by the General Council as entitling the holder to practise " dentistry or dental surgery " in that colony or foreign country, and as furnishing sufficient guarantees of the possession of the requisite knowledge and skill for the efficient practice of " dentistry or dental surgery."

Sect. 11 provides that a register shall be kept by the general registrar to be styled the dentists register ; and that register shall—

(*a*) Contain in one alphabetical list all United Kingdom dentists, that is to say, all persons who are registered under this Act as having been at the passing thereof engaged in the practice of " dentistry or dental surgery," and all persons who are registered as licentiates in " dentistry or dental surgery " of any of the medical authorities of the United Kingdom.

Sect. 18 provides that medical authorities with power to grant surgical degrees may hold examinations and grant certificates of fitness to practise "dentistry or dental surgery" to persons desirous of being so examined. The holder of such a certificate shall be a licentiate in "dental surgery or dentistry" of such medical authority.

Sect. 27 provides that a certificate under this Act shall not confer any right or title to be registered under the Medical Act, 1858 (21 & 22 Vict. c. 90), in respect of such certificate, nor to assume any name, title, or designation implying that the person mentioned in the certificate is by law recognized as a licentiate or practitioner in medicine or general surgery.

The effect of this Act was that only registered persons could use the name of dentist or dental practitioner or the like, or sue for their fees; but unregistered practitioners, of whom there were very many up to 1921, could still practise. The persons entitled to be registered, omitting foreign and colonial dentists, were (*a*) licentiates and (*c*) pre-1878 practitioners. Many persons were registered including both (*a*) and (*c*). As time went on class (*a*) gradually increased and class (*c*) naturally diminished, and would ultimately die out. The members of each class (*a*) and (*c*) were known very often under the description of either "surgeon dentist" or "dental surgeon," and they were the only persons who could be so described, the many unregistered practitioners having no right to use such a name.

In 1921 the Legislature thought it right to prohibit unregistered dentists from practising at all, but realizing the hardship that would result to the large number of unregistered practitioners and the public employing them, it made certain provisions for admitting them to the 1878 register.

In these circumstances the Dentists Act, 1921, "An Act to amend the Dentists Act, 1878, etc.," was passed on July 28, 1921.

Sect. 1 provides that no person shall, unless registered in the dentists register under the 1878 Act (the principal Act), practise or hold himself out, whether directly or by implication, as practising or being prepared to practise dentistry, under a penalty for so doing. This section comes into operation at the expiration of one year from July 28, 1921, extendible to two years by Order in Council.

Sect. 2 provides for the appointment and constitution of the Dental Board and the appointment of a Registrar.

Sect. 3 entitles certain persons to be admitted to the register.

Sub-s. 1 provides that the Board shall admit to the dentists register kept under the 1878 Act—

(*a*) any person who makes an application in that behalf within the interim period [defined in s. 14 as the year or extended period before the prohibitions of s. 1 come into operation] and satisfies the Board that he—

(i.) is of good personal character; and

(ii.) was for any five of the seven years immediately preceding the commencement of this Act engaged as his principal means of livelihood in the practice of dentistry in the British Islands, or was admitted to membership of the Incorporated Dental Society [a Society that admitted and looked after the interests of undegreed dentists, including the defendant and other members] not less than one year before the commencement of this Act; and

(iii.) had attained the age of twenty-three years before the commencement of this Act; and

(*b*) a similar provision as to dental mechanics, omitting the qualification by Incorporated Dental Society membership, but subject to his passing the prescribed examination in dentistry within ten years of the commencement of the Act.

Sub-s. 2 provides that any person who satisfies the Board that he was at the commencement of this Act engaged as his principal means of livelihood in the practice of dentistry in the British Islands, and within two years from the commencement of this Act passes the prescribed examination in dentistry, shall, for the purposes of this section, be treated as having been engaged for five of the seven years immediately preceding the commencement of this Act in the practice of dentistry in the British Islands as his principal means of livelihood.

The effect of s. 3 was that persons complying therewith could be put on the 1878 register, although they had no degree or diploma.

Sect. 4, headed "Use of titles and descriptions," provides that a person registered under the 1878 Act—

(*a*) shall, by virtue of being so registered, be entitled to take and use the description of "dentist or dental practitioner";

(*b*) shall not take or use, or affix to or use in connection with his premises, any title or description "reasonably calculated to suggest that he possesses any professional status or qualification other than a professional status or qualification which he in fact possesses" and "which is indicated by particulars entered in the register in respect of him."

Sect. 7 empowered the Board to make regulations as to the form and keeping of the register.

Sect. 14, after defining "registered dentist" as a person registered under the 1878 Act and "interim period" as above stated in s. 3, provides that for the purposes of this Act, the practice of dentistry shall be deemed to include the performance of any such operation and the giving of any such treatment, advice, or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth shall be deemed to have practised dentistry within the meaning of this Act.

Sect. 18 provides that the 1921 Act shall be construed as one with the 1878 Act.

The Schedule provides that two of the thirteen members of the Board shall be elected by "registered dentists not being qualified dentists," the expression "qualified dentists" there meaning persons "registered under the 1878 Act otherwise than by a right conferred by or under the provisions of the 1921 Act."

In accordance with regulations made under s. 7 (St. R. & O., 1923, Nos. 1615, 1616, 1617, p. 211; 1925, No. 649,

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p. 235; 1926, No. 799, p. 369) the register contained the name and address of the person registered, the date of registration, and in the last column "Description and date of qualification." In this column the degree or diploma, if any, was stated. Persons without a degree or diploma admitted under the 1878 Act, s. 6 (*c*), were entered as "Dentist 1878," and similar persons like the defendant, admitted under the 1921 Act, s. 3, sub-s. 1 (*a*), were entered as "Dentist 1921."

As already stated, many of the diminishing class "Dentist 1878" used the term "Dental Surgeon," but apart from the defendant, and one man in Scotland and a few in Ireland, no one of the 6858 persons registered as "Dentist 1921" did so, and the question was whether a person so registered could lawfully use the term.

The plaintiff's professional witnesses stated that to them the term "dental surgeon" prima facie meant a man with a degree or diploma, though it also included a pre-1878 man. The defendant's non-professional or "man in the street" witnesses stated that to them the term "dental surgeon" was the same as "dentist" and did not suggest any degree or diploma, and that a man with a degree or diploma would use it as a matter of course.

Gavin Simonds K.C. and *H. G. Robertson* for the plaintiff. After the 1878 Act the title of "dentist" or "dental practitioner" or "dental surgeon" could only properly be used by registered persons. But owing to the decision in *Bellerby* v. *Heyworth* (1)—the charter of the unregistered—unregistered persons were allowed to sail very near the wind in the matter of self-advertisement and otherwise, though they could not actually use the names. This was the evil to be remedied by the 1921 Act, and it is in that light that s. 4 ought to be construed: *River Wear Commissioners* v. *Adamson.* (2)

Sect. 4 allows registered persons to use the description of dentist or dental practitioner, but it forbids them to use any title or description reasonably calculated to suggest the

(1) [1910] A. C. 377.

(2) (1877) 2 App. Cas. 743, 764.

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possession of any "professional status or qualification" not in fact possessed and not entered in the register.

The evidence shows that to well informed persons the term "dental surgeon" suggests either a "qualification" by degree or diploma or the "status" of a pre-1878 registration. The fact that to the ordinary man in the street, who has probably never heard of the Acts, the term suggests no more than "dentist" is surely immaterial. That kind of evidence is worthless.

But quite apart from the evidence, the case is clear on construction. A "Dentist 1921" cannot use any description implying that he has either the status of a "Dentist 1878" or a qualification by degree or diploma, neither of which status or qualification he possesses, and apart from the defendant and one or two others none of the class "Dentist 1921" have done so.

Grant K.C. and *J. R. Butterfield* for the defendant. The evidence of the ordinary man is the important feature in a case of this sort. The evidence of specialists cannot prevail.

[FARWELL J. I cannot disregard the specialists' evidence. To them the term "dental surgeon" would reasonably suggest a "professional status or qualification" not possessed by the defendant.]

The words "professional status or qualification" really refer to a degree or diploma. But suppose professional status includes the status attached to being on the register. There is only one register—namely, the 1878 register. The defendant is on that register. Surely the right of admission by which he got there is not a professional status or qualification within s. 4, although for convenience the register distinguishes undiplomaed persons as "Dentist 1878" and "Dentist 1921."

Again there is really only one Act, made up of the 1878 and 1921 Acts. The plaintiff's argument proceeds on the footing that s. 4 imposes special disabilities on persons getting on the 1878 register under s. 3 of the 1921 Act. That is not so. It imposes those disabilities on all persons on the 1878 register no matter how they got there, and unless the words "professional status or qualification" are confined to degree or diploma they are meaningless with regard to the 1878 registrants.

Sect. 4 replaces s. 3 of the 1878 Act, which section is repealed. Sect. 3 provided that a person not registered under the 1878 Act should not be entitled to take or use the name or title of "dentist" or of "dental practitioner" or any name, title, addition, or description implying that he was so registered, or that he was specially qualified to practise dentistry. Sect. 4 of the 1921 Act, on the other hand, allows a registered person to use the description of "dentist" or "dental practitioner" but forbids the use of any title or description suggesting any "professional status or qualification" that he does not possess.

Now s. 5 of the 1878 Act entitles a person registered under that Act to practise "dentistry and dental surgery." The defendant, being now so registered, is therefore directly entitled to practise "dentistry and dental surgery." Why may he not say so? "Dental surgeon" merely means a man practising "dental surgery."

The only real disability imposed on the class "Dentist 1921" is that for some obscure reason they have no voice in the election of the Dental Board. In other respects, so far from being a *race maudite*, they have the full privileges of the joint Acts.

Gavin Simonds K.C. replied.

FARWELL J. [after stating the facts and reading the relevant sections of the 1878 and 1921 Acts:] The question comes back to the true meaning and construction of s. 4 of the 1921 Act. It is perhaps noticeable that the 1921 Act when providing the title that a registered person may use does not use the term "dental surgeon." It provides that he may take and use "the description of dentist or dental practitioner." Of course that by itself does not prohibit the use of some other description. It is merely an affirmative provision entitling a person to describe himself as dentist or dental practitioner.

The defendant rightly says that the 1878 and 1921 Acts must be read together, and invites me to notice that the term "dentistry or dental surgery" is used in many places in the 1878 Act. He contends that a dentist does in fact carry on dental surgery as part of his profession, and if so, why should he not describe himself as "dental surgeon," unless the 1921 Act in terms prohibits it?

I feel the force of that argument, but I have to consider whether, having regard to the circumstances and the evidence, the use of the term "dental surgeon" is reasonably calculated to suggest that the person so described "possesses any professional status or qualification other than a professional status or qualification which he in fact possesses and which is indicated by particulars entered in the register in respect of him."

Now up to the 1921 Act there was only one class of persons entitled to be styled "dental surgeons"—namely, persons registered under the 1878 Act either in virtue of a degree or diploma or in virtue of previous practice. No one else could use the term.

When the 1921 Act permitted another class of persons altogether to be registered and did not in terms provide that they might describe themselves as "dental surgeons" it follows in my judgment, apart from any evidence as to the meaning of the term, that for a person only registered under the 1921 Act, s. 3, sub-s. 1 (*a*), to call himself a "dental surgeon" is reasonably calculated to suggest that he possesses a professional status or qualification other than that which he in fact possesses, because he is in fact describing himself as a member of the 1878 registered class, the only class up to 1921 entitled to call themselves "dental surgeons."

If the Legislature had intended to allow any one getting on the register under the 1921 Act to call himself a "dental surgeon" it would have said so in terms. But it does not. It expressly permits a registered person to describe himself as a "dentist" or "dental practitioner" but it does not permit him in terms to describe himself as a "dental surgeon," a description up to that date only applicable to persons registered under the 1878 Act.

If that is the true view, then quite apart from the evidence there is an end of the matter. [His Lordship then dealt shortly with the professional evidence called by the plaintiff to the effect that the term "dental surgeon" imported either a diploma or a pre-1878 qualification, and the evidence of the uninstructed public called by the defendant to the contrary. If it were necessary to determine this case on the evidence, the proper inference would be that while to many people in this country the term "dental surgeon" has no particular significance, to a considerable number it has a particular meaning, and implies a person either with a degree, licence, or diploma or registered in virtue of practice before 1878. In these circumstances it was impossible to say that the use of the title "dental surgeon" would not reasonably suggest to a considerable number of the public, though not to all, that the defendant had some status or qualification which he did not in fact possess. His Lordship continued :]

The defendant contends that the phrase "professional status or qualification" in s. 4 cannot refer to registration under the 1878 Act.

I am unable to accept that view. It seems to me that if a dentist getting on the register under the 1921 Act chose to describe himself as registered under the 1878 Act, when in fact he had not been so registered, he would be clearly suggesting that he had a "professional status or qualification" which he did not possess.

If a person, not registered under the 1878 Act nor having a professional degree or diploma, describes himself as a "dental surgeon" he is in fact stating that he has a professional status or qualification not indicated by particulars entered in the register in respect of him, which in this case are the words "Dentist 1921."

For these reasons, putting my decision on the construction of s. 4 simpliciter, and not on the evidence, I have come to the conclusion that this action must succeed and that the plaintiff is entitled to his declaration, injunction, and costs.

Solicitors : *Metcalfe, Hussey & Hulbert ; Percy Robinson & Co.*

G. R. A.

In re CATLING.

PUBLIC TRUSTEE *v.* CATLING.

[1920. C. No. 460.]

BENNETT J.

1931

June 25, 26.

Will—Settled Land—Option to Testator's Wife of becoming Tenant at a Rent—Limited Owner—Whether powers of Tenant for Life exercisable—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 20, *sub-s.* (*i.*), (*iv.*), (*vi.*).

A person who is a tenant of settled land under a lease at a rent is, as a matter of necessary implication from the language of s. 20, sub-s. (i.), para. (iv.), of the Settled Land Act, 1925, excluded from the class of persons upon whom the section confers the powers of a tenant for life. The amount of the rent is immaterial.

ADJOURNED SUMMONS.

The testator, William Catling, by his will dated September 29, 1921, appointed the Public Trustee to be the sole executor and trustee thereof, and by clause 10 devised his "freehold house and premises, together with the garden and orchard belonging thereto known as Brookland at Shepperton in the county of Middlesex," and his "freehold land known as Brook Meadow, Shepperton, aforesaid, and the remaining portion of the meadow and arable land about four acres adjoining and the land now leased to Armstrong and Main under lease dated the 9th September 1919 the piece of land adjoining the Rustless Iron Works at Shepperton Station leased to Armstrong and Main under lease dated the 18th December 1919," in the following terms, "Unto and to the use of my trustee in fee simple upon trust that my trustee shall if my wife so desire let the same to her on a yearly tenancy at a rent of 1*l.* per annum without power for her to assign sub-let or part with possession of Brookland aforesaid or any part thereof or to assign the said tenancy as regards any other part of the premises comprised in the devise contained in this clause and upon the terms of her making Brookland aforesaid her principal residence Provided that so long as my said wife shall be living and shall duly observe and perform the conditions aforesaid a notice to determine such tenancy

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shall not be effectual unless given by my said wife to my trustee but on any default on her part in observing and performing the conditions aforesaid such notice may be forthwith given by my trustee and such tenancy shall in any case cease on her death Provided that during the continuance of such tenancy my said wife shall be entitled to receive the rents payable under any leases affecting the devised hereditaments or any part thereof And I declare that in the event of such tenancy being determined the devised hereditaments shall be charged with the payment to my said wife of " an annuity given to her by clause 8 of the will " or so much thereof as the income for the time being of my residuary estate may be insufficient to pay From and after the determination of the aforesaid tenancy but subject to the charge of the said annuity I direct my trustee to convey the said hereditaments to the Lock Hospital Harrow Road in the county of London or the trustees of such hospital the said hereditaments to be conveyed charged with and subject to an annual rent charge of *5l.* free of all deductions payable to the Lying-in Hospital for Women Grays Inn Road in the county of London or the trustees of such hospital such rent charge to be created and secured in such manner and form as my trustees shall think fit and the said house land and premises to be used for ever as a convalescent home and grounds for the benefit of the patients of such hospital upon the condition that no person shall be knowingly admitted to or employed at the said home unless born within a radius of 15 miles as the crow flies of the Royal Exchange London Provided always that if the said hospital shall not before the expiration of one year after my death accept the devise and have obtained the necessary sanction from the Court or the Charity Commissioners to retain the said house and lands unsold or if the said hospital shall cease at any time thereafter to use the said house and lands for the purpose of a convalescent home or if for any other reason the trust in favour of the Lock Hospital shall not take effect then I declare that the said house and lands shall go and belong to the said Lying-in Hospital."

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The testator died on February 18, 1929, and this summons was taken out by the Public Trustee for the determination of the question (inter alia) whether the testator's widow was the tenant for life or a person having the powers of a tenant for life within the meaning and for the purposes of the Settled Land Act, 1925, of the property comprised in the specific devise contained in clause 10 under a settlement of the same property created by the same clause and accordingly a vesting assent or conveyance in respect of the same property ought to be executed in her favour by the plaintiff.

C. A. J. Bonner for the applicant.

C. V. Rawlence for the testator's widow. The widow, having taken up the tenancy, is the tenant for life under ss. 19 and 20 of the Settled Land Act, 1925. A terminable life interest has been created. [He referred to Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., vol. ii., pp. 84, 91, 279.] " Possession " for the purposes of the Act is defined in s. 117. The position of the widow is within para. (vi.) or para. (viii.) of s. 20. [He referred to *In re Gibbons* (1) and *In re Boyer's Settled Estates.* (2)]

Sect. 20 is intended to cover all cases which would not fall within the provisions of s. 19. The Act is primarily concerned with life interests, but it is also concerned with cases involving less than a life interest. This is a tenancy from year to year, terminable by some act of the widow. It is claimed that a vesting assent should be created in her favour. The scheme of the will must be considered as a whole in order to ascertain who is the tenant for life.

F. R. Evershed for the Lock Hospital. The paragraphs in s. 20 must be read together, otherwise para. (iv.) would be otiose. If the widow is holding under a lease at a rent she does not come within the section. The case would have come under s. 19 if it were not for the liability to cesser on ceasing to reside. If, under the will, she is holding under a lease at a rent she is not a tenant for life. As para. (iv.) necessarily excludes a person holding on lease at a rent, and as para. (vi.)

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(1) [1920] 1 Ch. 372.

(2) [1916] 2 Ch. 404, 410.

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merely says that a person whose interest is terminable on a conditional limitation is a tenant for life, it is right that there should not be included in the latter paragraph the words, "not holding under a lease at a rent."

The Lock Hospital, being entitled subject to the lease to the widow, is entitled to exercise the powers of a tenant for life.

Cyril Radcliffe, *Henry Johnston*, *Stafford Crossman*, *H. Watt Dollar*, *J. W. M. Holmes*, and *Beebee* for other parties.

[*In re Drew's S.E.* (1) and *In re Jobson* (2) were also referred to.]

BENNETT J. [after reading clause 10 of the will as above set out, continued :] The first question which is raised by this summons is whether under this will the defendant Emily Catling, the testator's wife, is the tenant for life, or a person having the powers of a tenant for life, within the meaning and for the purposes of the Settled Land Act, 1925, of the property comprised in the specified devise contained in clause 10. The testator died on February 18, 1929, and the first question has to be determined by reference to the provisions of the Settled Land Act, 1925.

It is argued on behalf of the testator's wife that she is a person who has the powers of a tenant for life under s. 20 of the Settled Land Act, 1925, the contention being that she falls within para. (vi.) of sub-s. 1 of that section or possibly within para. (viii.) of sub-s. 1 of that section. Para. (vi.) is in these terms, "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for any purpose." The contention is that if you look at the substance, or what is said to be the substance of the devise, in substance it is a gift by the testator to his wife with an executory gift over in case she should cease to make

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(1) Unreported (1911), D. No. 377.

(2) (1889) 44 Ch. D. 154.

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Brookland her principal residence. It is said that that is the substance of the gift, because the rent of 1*l.* per annum, which if she exercises her option of taking a tenancy she is to pay for the property the subject of the devise, is said to be merely a nominal rent, and that fact, coupled with the provision that during the continuance of the tenancy if she exercises her option she is to be entitled to receive the rents receivable under any lease affecting the devised hereditaments, shows that in substance the testator intended his wife to be a tenant for life, and that this conditional limitation or executory limitation over was to come into operation in case she ceased to make Brookland her principal residence. The answer to that contention is founded upon s. 20, sub-s. 1, para. (iv.), and it is said that by necessary implication there is excluded from the persons to whom the section gives the powers of a tenant for life any person who holds under a lease at a rent, and the contention is that Mrs. Catling, if she exercises her option, will be nothing more than a tenant holding under a lease at a rent.

In my judgment, as a matter of necessary implication from the language of sub-s. 1, para. (iv.), a person who is a tenant under a lease at a rent is excluded from the class of persons upon whom the section confers the powers of a tenant for life; and as a matter of construction, what the testator has done is to give to his wife the option of becoming a tenant under a lease at a rent. Therefore, in my view, she is not a person who has under s. 20 the powers of a tenant for life, and the answer to the question should be in the negative.

Solicitors: *Landons; Dimond & Son; Hyde, Mahon & Pascall; Andrew, Purves, Sutton & Creery; Treasury Solicitor; Francis & Crookenden.*

J. L. D.

BENNETT J.

1931

July 1, 2.

In re SMITH.

PUBLIC TRUSTEE *v.* SMITH.

[1931. S. No. 714.]

"Unto my country England"—Not charitable Bequest—Uncertainty.

A testator by his will gave his residuary estate "unto my country England."

Held (following *In re Tetley* [1923] 1 Ch. 258; [1924] A. C. 262), that the gift was not a gift which must necessarily be confined to charitable purposes and it was therefore void.

Held also, that, in using the phrase "unto my country England," the testator could not be clearly regarded as having intended that the bequest should operate in favour of His Majesty's Treasury; and that the residue was consequently undisposed of and devolved as on an intestacy.

THE testator, Theodore Wynford Smith, by his will dated January 13, 1917, appointed the Public Trustee to be the sole executor thereof and, after directing that his debts and funeral expenses should be paid by his executor, provided as follows: "I give devise and bequeath all my estate and effects whatsoever and wheresoever both real and personal whether in possession or reversion remainder or expectancy unto my country England to and for — own use and benefit absolutely." The testator died on April 23, 1930.

A summons was taken out by the Public Trustee for the determination of the question whether the residuary gift "unto my country England" (*a*) constituted a valid charitable gift, or (*b*) operated in favour of His Majesty's Treasury, or (*c*) was void.

Wilfrid Hunt for next of kin. If the gift is not a valid charitable gift, it will be argued on behalf of the Solicitor-General that the money is payable to the Chancellor of the Exchequer for the reduction of the national debt. The gift is, however, void on the authority of *Nightingale* v. *Goulburn* (1) and devolves as on an intestacy. In that case the country referred to was Great Britain. In the present case

(1) (1847) 5 Ha. 484.

it is England, and there is no Chancellor of the Exchequer for England. The gift is not a good charitable gift—see *In re Tetley.* (1)

Greenland for persons in the same interest.

Stafford Crossman for the Attorney-General. This is a good charitable trust to be carried out by a scheme under the sign manual. It is not a gift on trust for charitable purposes, but a gift to a place, i.e., a gift to every inhabitant of that place. [He referred to *West* v. *Knight* (2); *Attorney-General* v. *Lord Lonsdale* (3); *Mitford* v. *Reynolds* (4); *Dunne* v. *Byrne* (5); and *Attorney-General* v. *Webster.* (6)]

None of the dicta in *Houston* v. *Burns* (7) relate to a direct gift to an individual—the individual in the present case being a country.

[He also referred to *In re Pyne.* (8)]

A. Andrewes-Uthwatt for the Solicitor-General. If this is not a good charitable gift it is an effective gift to the Crown, i.e., to the King in right of his crown. The testator has made a gift to the nation, and the King is the person who represents the nation as an organized body. Charity is out of the way altogether, and there is no trust at all. This is a perfectly valid gift to the nation.

BENNETT J. This case arises on the will of the late Theodore Wynford Smith, dated January 13, 1917, the testator having died on April 23, 1930. His will was made on a form obtained from a law stationer and is in these terms. [His Lordship read the will and continued :] The estate of the testator was of the value of approximately 5800*l.* The Public Trustee, having proved the will on August 16, 1930, has taken out the originating summons now before the Court. [His Lordship read the question raised by the summons.] Three contentions have been advanced : the first, advanced on behalf of one of the testator's next of kin is to the effect that the gift is void and that the estate devolves as undisposed of upon the next of kin. The second contention, advanced on behalf of the Attorney-General, is that the gift constitutes a valid charitable gift, because, on its true construction, the gift is for the general benefit of the community as a whole; and that, such a gift, being a valid charitable gift, the property will be disposed of by the King under the sign manual. The third contention, advanced on behalf of the Solicitor-General, on the footing that there has not been a valid charitable disposition, was that on its proper construction the gift is a gift to the King in right of his crown, in which case the property would be paid into the Consolidated Fund and so would enure for the benefit of the nation as a whole.

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(1) [1923] 1 Ch. 258; [1924] A. C. 262.
(2) (1669) 1 Ch. Cas. 134.
(3) (1827) 1 Sim. 105.
(4) (1841) 1 Ph. 185.
(5) [1912] A. C. 407.
(6) (1875) L. R. 20 Eq. 483.
(7) [1918] A. C. 337, 345, 349.
(8) [1903] 1 Ch. 83.

The first thing which I have to do is to determine, if it can be done with any certainty, what objects the testator had in view when he gave all his property to his country England, and, there being nothing in the document itself to assist me in interpreting that phrase, I confess that, from the language which the testator has used, I have very great difficulty in determining that he had any definite object in his mind as to the persons to whom his estate was to be paid, after his debts, funeral and testamentary expenses had been discharged.

But Mr. Crossman, on behalf of the Attorney-General, has submitted that, upon the authority of such cases as *West* v. *Knight* (1); *Attorney-General* v. *Lord Lonsdale* (2); *Mitford* v. *Reynolds* (3); and *Attorney-General* v. *Webster* (4), the gift ought to be interpreted as meaning a gift for the general benefit of the community as a whole and, as such, on the authority of those cases, the gift is a charitable gift which would be disposed of by the King under the sign manual.

The difficulty which I have in deciding in his favour upon these grounds arises from the decision of *In re Tetley* (5), because, as I read what was said in the Court of Appeal by Lord Sterndale M.R. and Warrington L.J. and by Viscount Cave L.C. in his speech in the House of Lords, a gift for the

(1) 1 Ch. Cas. 134.
(2) 1 Sim. 105.
(3) 1 Ph. 185.
(4) L. R. 20 Eq. 483.
(5) [1923] 1 Ch. 258, 267; [1924] A. C. 262.

general benefit of the community was not considered by them to be a gift which must necessarily be confined to charitable purposes. The case considered in *In re Tetley* (1) was a disposition by the testator of one-fifth of the proceeds of his residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." The case came before Russell J., who decided that the words of the gift must be read disjunctively and that, as under its terms the trustees could apply the trust property for purposes not necessarily charitable, the trust was void, and did not cease to be void because the patriotic purposes or objects were confined to those within the British Empire.

In the Court of Appeal it was argued on behalf of the Attorney-General that the trustees must dispose of the trust property for some purpose which was for the benefit of the State or of the community and, in dealing with that argument, Lord Sterndale M.R. said: "When the case was first opened, I hope I did not do Mr. Tomlin an injustice, but I took his argument upon the meaning of the word 'patriotic' to be this: 'Patriotic' means for the benefit of the country, and what is for the benefit of the country is charitable, and similarly in his reply: 'Patriotic purposes' means something for the protection and welfare of the State, and what is for the benefit of the State is charitable. Of course if that proposition can be established he is right, but it must go as far as this, I think, that the meaning of the word 'patriotic' is such that it excludes from 'patriotic purpose,' or 'patriotic object,' every purpose, and every object, which is not charitable in the legal sense of the word. Unless it goes as far as that it does not seem to me to go far enough. That argument is, in a great measure, founded upon the important and often quoted passage from the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2), and it is said that 'patriotic' having that

(1) [1923] 1 Ch. 258, 267; [1924] A. C. 262. (2) [1891] A. C. 531, 583.

meaning, it falls within what Lord Macnaghten there describes as the fourth class, which is this: 'trusts for other purposes beneficial to the community, not falling under any of the preceding heads.' I will assume that 'patriotic' has the meaning of 'for the benefit of the State.' I am not at all sure that, used as it is in this will, and used in the sense in which ordinary persons understand the word, it necessarily is confined to things which are, in truth and in fact, necessarily for the benefit of the State. I am by no means clear that in ordinary language that is the meaning of the word 'patriotic.' But I will assume that it is, and then it comes, as I say, within Lord Macnaghten's fourth class of 'trusts for purposes beneficial to the community,' because there does not appear to me to be very much difference between 'for the benefit of the State' and 'beneficial to the community.' In *In re Macduff* (1) it was distinctly held, as far as I can see, by, at any rate, two members of the Court, Lindley and Rigby L.JJ., that it was wrong to turn the statement of Lord Macnaghten that charitable trusts must be 'trusts for purposes beneficial to the community' round in this way, and to say that trusts for purposes beneficial to the community must be charitable trusts. That is expressly repudiated by those two learned judges, and therefore it seems to me, upon that decision, it is impossible for us to say that even giving to the words 'patriotic' or 'patriotic purposes or objects' the meaning which the appellants wish us to do they necessarily exclude objects which are not technically charitable, although they are patriotic within that meaning of the word."

Warrington L.J. in the same case says (2): "I will assume for the moment that the word 'patriotic' does exclude objects that are not beneficial to the community, and that it is synonymous with a description of objects which are so beneficial. Are those objects necessarily charitable?" Having asked that question the learned Lord Justice answers it in the negative and on that ground holds the trust void.

(1) [1896] 2 Ch. 451.

(2) [1923] 1 Ch. 258, 271.

Viscount Cave L.C., in his speech in the same case (1) in the House of Lords, expresses, I think, the same view quite clearly.

It seems to me that assuming that this gift "unto my country England" ought to be interpreted as meaning a gift for the general benefit of the community of England as a whole it is not a gift which must necessarily be confined to charitable purposes, and therefore is one which, on the authority of the passages to which I have referred in *In re Tetley* (2), I must hold to be void; and, so far as the argument of the Attorney-General is concerned, I so hold.

Then the question arises whether the argument on behalf of the Solicitor-General is one to which I ought to accede. I cannot bring myself to believe that this testator, when he used the phrase: "unto my country England" really intended to say, or that I ought to think he intended to say, that the gift was to the King in right of his crown. If I were so to interpret the language, I should in reality be guessing at what was in the mind of the testator. Accordingly in my judgment the bequest does not operate in favour of His Majesty's Treasury.

The real fact appears to be that when the testator used the words he never had any definite idea in his mind as to the object which he intended to benefit, and therefore I think that instead of interpreting his words I should be making a new will if I were to decide in favour of the Attorney-General or the Solicitor-General.

Accordingly I hold that the residuary estate of the testator has not been disposed of and devolves as on an intestacy.

Solicitors: *Walter Crimp & Co., for Harold Michelmore & Co., Newton Abbot; Sharpe, Pritchard & Co., for W. C. Cripps, Son & Harries, Tunbridge Wells; Treasury Solicitor.*

J. L. D.

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(1) [1923] 1 Ch. 258; [1924] A. C. 262. (2) [1923] 1 Ch. 258, 271.

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[1930. H. 4790.]

Insurance (Industrial)—Insurance Company—Appointment by Industrial Assurance Commissioner of Inspector to investigate affairs of Company —Publicity of Inquiry—Discretion of Inspector—Friendly Societies Act 1896 (59 *&* 60 *Vict. c.* 25), *s.* 76, *sub-s.* 5—*Industrial Assurance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *s.* 17, *sub-s.* 1.

The power conferred by s. 17 of the Industrial Assurance Act, 1923, upon the Industrial Assurance Commissioner (or an inspector appointed by him for the purpose) to examine into and report on the affairs of an industrial assurance company is not confined to holding an inspection behind closed doors, but extends to holding such an inspection in a place open to the public.

So *held* by the Court of Appeal (Lawrence and Romer L.JJ.; Lord Hanworth M.R. dissenting) affirming the decision of Luxmoore J.

ACTION.

The following statement of facts is taken substantially from the judgment of Luxmoore J.:—

On December 7, 1929, the Industrial Assurance Commissioner, in exercise of the power conferred on him by s. 17 of the Industrial Assurance Act, 1923 (1), appointed Mr. John Fox, the Deputy Industrial Assurance Commissioner, to be inspector for the purpose of examining into and reporting on the affairs of the plaintiff company. It was stated that the appointment was made because, in the opinion of the Commissioner, there was reasonable cause to believe that offences had been committed against the Friendly Societies Act, 1896, and the Industrial Assurance Act, 1923. Upon his appointment and under the powers conferred on him by the above mentioned Act of 1923, and also of s. 76, sub-s. 5, of the Friendly Societies Act, 1896 (1), the inspector required the production of various books and documents of the company. After he had examined these he fixed June 19 and 20, 1930, at the Town Hall, Newcastle-on-Tyne, for the examination on oath of certain persons whose evidence he wished to obtain. The inspector gave notice of the time and place of the appointment to the local newspaper offices to enable their reporters to attend and report the proceedings. At the opening of the examination, the inspector made a statement as to the nature of the proceedings and the reasons for the inspection, and afterwards proceeded to examine on oath, with regard to the company's affairs, the officers, agents, and servants of the company and also others who did not fall within any of those categories. After the examination of the witnesses at Newcastle had been concluded, the inspector arranged that the proceedings should be continued on July 16, 1930, at the City Hall, Cardiff.

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(1) Industrial Assurance Act, 1923, s. 17, sub-s. 1: "If, in the case of any collecting society or industrial assurance company, in the opinion of the Commissioner there is reasonable cause to believe that an offence against this Act or against the Friendly Societies Act, 1896, or the Assurance Companies Act, 1909, has been, or is likely to be committed, the Commissioner or any inspector appointed by him for the purpose shall have power to examine into and report on the affairs of the society or company, and for that purpose may exercise in respect of the society or company all or any of the powers given by sub-s. (5) of section seventy-six of the Friendly Societies Act, 1896, to an inspector appointed under that section." "(2) On himself holding such an Inspection or on receiving the report of an inspector so appointed the Commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein and in particular may in the case of a society award that the society be dissolved and its affairs wound up, and in the case of a company may present a petition to the court for the winding up of the company."

The inspector in due course attended at the City Hall, Cardiff, and on this occasion the company by its solicitors objected to the proceedings being held in public. The inspector, however, overruled this objection, reporters were again present, and the examination on oath of witnesses was continued as before in public.

It appeared that on July 7, 1930, the company's solicitors had written to the Commissioner stating that the company had raised serious objections to the preliminary statement

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(1) Friendly Societies Act, 1896, s. 76, sub-s. 5: "An inspector appointed under this section may require the production of all or any of the books and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer such oath accordingly."

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made by the inspector at Newcastle and to the jurisdiction of the inspector to hold the inspection in public. On July 14, 1930, the company's solicitors again wrote to the inspector stating at length the company's objections to what had happened, and the grounds on which the company claimed that the proceedings should not take place in public. The points raised in their letters were finally dealt with on December 4, 1930, when the inspector wrote to the company's solicitors stating that he proposed to proceed with his examination into the affairs of the company upon the basis that the inquiry was a judicial proceeding, and as such must be held in public. The letter proceeded to state that no technical objection would be taken to an action by the company against His Majesty's Attorney-General for a declaration that an inspector was not entitled to hold an inquiry in public; and, further, that the Attorney-General would assist in obtaining a speedy trial of an action of this nature.

On December 22, 1930, the company issued their writ in the action against His Majesty's Attorney-General, and claimed the following relief—namely: (1.) A declaration that an inspector appointed by the Industrial Commissioner under s. 17, sub-s. 1, of the Industrial Assurance Act, 1923 for the purpose of examining into and reporting on the affairs of the plaintiffs is not bound to conduct such examination in public; (2.) A declaration that an inspector appointed by the Industrial Assurance Commissioner under the said sub-section for the said purpose is not entitled to conduct such examination in public; and (3.) a declaration that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and by s. 76, sub-s. 5, of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purpose of preparing his report on the affairs of the plaintiffs.

In the defence the Attorney-General admitted that so far as he lawfully could the inspector would continue to hold

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the examinations into the affairs of the plaintiff company in public. He denied, however, that the contentions put forward on behalf of the plaintiff company were well founded, and stated that the plaintiffs were not entitled to any of the declarations asked for in their statement of claim.

Sir John Simon K.C., *J. H. Stamp* and *Blanco White* for the plaintiffs. On the true construction of the Industrial Assurance Act, 1923, the inspector appointed by the Commissioner is neither required nor authorized to exercise these powers in public or to invite the public to attend; the hearing before him is not in any sense a judicial proceeding, but is ancillary to the duty which the Commissioner himself ultimately has to discharge. The inspector has misconceived the range of publicity to which he thinks he is entitled.

The material section is s. 17 of the Industrial Assurance Act, 1923. The section does not say "to hold an inquiry," still less "to hold a public or local inquiry," but the power of the inspector appointed by the Commissioner is specific, "to examine into and report on the affairs of the society or company, and for that purpose may exercise," and so on.

The words "examine into and report on" might be construed on the principle of reddendo singula singulis.

Sect. 76, sub-s. 5, of the Friendly Societies Act, 1896, is also material. It is submitted that the inspector has gone further than is permitted by the sub-section.

The question is, what does the statute authorize the inspector to do? A convenient test might be to consider the law of defamation. Judicial proceedings of course must take place in public: *Scott* v. *Scott*. (1) The matter is naturally one of very great importance to the plaintiffs.

Although a question of the construction of an Act of Parliament, it might be helpful to consider cases: see *In re Grosvenor and West-End Ry. Terminus Hotel Co.* (2)

An analogy might also be found in Acts such as the Regulation of Railways Act, 1871, where inspectors are appointed, see ss. 3 and 4; and contrast these sections with

(1) [1913] A. C. 417.

(2) (1897) 76 L. T. 337.

s. 7 of the same Act as to the directing of an inquiry. Another statute is the Housing Act, 1925: see s. 23. If the statute had said that in certain events a person so authorized might hold an inquiry, it might well be that the inquiry could be held in public, notwithstanding that the word "public" was not mentioned. But there is a distinction when the statute does not provide for the holding of an inquiry at all, but merely that the inspector is only to examine and report to the Commissioner, and if he meets with any obstruction may rely on the Friendly Societies Act, 1896, only for the purpose of examining on oath officers and others belonging to the Society in relation to the business. The inquiry has none of the qualities of a judicial or public proceeding; there is no lis.

Sir William Jowitt A.-G., *Sir Stafford Cripps S.-G.* and *Stafford Crossman* for the Attorney-General. The plaintiff company's position cannot be prejudiced by the publicity of an inquiry of this nature. Further, in insurance societies the holding of public inquiries is desirable in the public interest; it tends to check abuses. No useful examination can take place into the affairs of the society unless the public are admitted.

It is the duty of an inspector to hold an inquiry of this nature in public, unless there is some good reason to the contrary; some special circumstance which would render such a course likely to defeat the objects of the inquiry. There is a discretion which the High Court of course possesses if it thinks that under the circumstances it would be better to decide a particular case in camera. See *Scott* v. *Scott* (1) and Lord Haldane's remarks.

Secondly, an inspector is entitled as representing the Commissioner to conduct an examination in public, he has a discretion; so also has the Commissioner. This, of course, depends not only on the Act itself, but also on certain broad general principles. If the Commissioner himself decides to conduct the examination, he may in the case of a collecting society award that it be dissolved and its affairs wound up. Of course the society has the right of appeal. In such a case, should not the hearing by the Commissioner, if he thinks fit, be in public ? If these proceedings in the case of a hearing before the Commissioner are judicial, they should be conducted in public. If, on the other hand, they are not judicial, they are administrative and certain judicial results follow at any rate. There is nothing in this particular Assurance Act to deprive the Commissioner of his discretion.

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(1) [1913] A. C. 417, 437.

On the general question of publicity, see *Scott* v. *Scott* (1) and the remarks of Lord Shaw of Dunfermline.

As to the distinction between judicial and administrative powers, see *Bottomley* v. *Brougham* (2) and *Dawkins* v. *Lord Rokeby* (3), where the Court held that as regards the particular body—a Court of inquiry—there mentioned, although not a Court of law, it was at the same time in the position analogous to that of a Court of law. In the *Grosvenor, &c., Hotel Co.'s* case (4), see Lord Esher M.R.'s remarks as to the extent of the powers of the inspector to hold the inquiry there referred to.

The Commissioner, if he holds the inquiry, is carrying out quasi-judicial and not merely administrative functions. What is there in this Act which fetters or limits the discretion of the Commissioner or the inspector appointed by him—a discretion to conduct the proceedings in public ? Proceedings of this nature should be in public, and the inspector has power to use his discretion whether to conduct them in public or not.

Sir John Simon K.C. in reply. The statute gives no specific power to the inspector, and no provision is made in the statute for formulating as between the inspector and the assurance company what the issue is to be. Further, of course, it cannot be overlooked that the statute does not authorize an inquiry at all. The inspector's duty is to report to the Commissioner. Considerations of policy should not be considered by the Court.

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(1) [1913] A. C. 417, 477.
(2) [1908] 1 K. B. 584, 587.
(3) (1873) L. R. 8 Q. B. 255, 266.
(4) 76 L. T. 337, 338.

Cur. adv. vult.

May 4. LUXMOORE J. [stated the facts and continued :] There is no dispute of fact. The material facts are admitted, and have already been stated by me. It is to be observed that the declarations sought are in general terms, and are framed so as to be of general application to all inspections held under the Industrial Assurance Act, 1923. They are wholly independent of any particular facts or of the conduct of any particular inspector, though Sir John Simon, in the course of his argument, stated that the plaintiff company's reasons for seeking the declarations were that the inspector had, in his allocution at Newcastle-on-Tyne, made statements in public derogatory to the company, and that the inspector had examined on oath persons whom he was not authorized to examine. It is said that the inspection directed to be held is not a judicial proceeding, and that the Court should therefore declare that it should be held in private.

In my judgment the solution of the question I have to determine cannot depend on whether the inspection is a judicial or quasi-judicial proceeding, or is of a less formal character. Its solution must depend on the actual provisions of the Act of Parliament under which the inspection is to be held, because in my judgment the Court has no jurisdiction to determine how a tribunal—set up under the provisions of an Act of Parliament for a particular purpose—shall conduct its proceedings, except in so far as this determination involves the construction of the Act in question. Obviously the Legislature can set up any tribunal it may think fit and may provide for the conduct of its proceedings.

If an Act of Parliament directs that an inquiry or inspection or any other proceeding shall be held, but is silent as to the manner in which it shall be conducted, the Court has no power to assume the function of the Legislature and prescribe how the proceeding shall be conducted. In such a case it seems to me that the matter is left to the discretion of the particular tribunal. No doubt it is a matter of common occurrence for Parliament to direct the holding of inquiries and other proceedings, and many Acts of Parliament contain provisions for this purpose. In some of those Acts express provisions are to be found directing the holding of the proceedings in public; in others there are express provisions that the proceedings are to be held in private.

In the present case there is no express provision requiring the inspection to be held in public or in private, and it is therefore necessary to consider whether the Act contains any provisions, express or implied, covering the procedure with regard to an inspection under it. The section which authorizes the inspection is s. 17 of the Industrial Assurance Act, 1923. It provides that "If, in the case of any collecting society or industrial assurance company, in the opinion of the Commissioner there is a reasonable cause to believe that an offence against this Act or against the Friendly Societies Act, 1896, or the Assurance Companies Act, 1909, has been, or is likely to be committed, the Commissioner or any inspector appointed by him for the purpose shall have power to examine into and report on the affairs of the society or company, and for that purpose may exercise in respect of the society or company all or any of the powers given by sub-section 5 of section 76 of the Friendly Societies Act, 1896, to an inspector appointed under that section." The sub-section last referred to of s. 76 of the Friendly Societies Act, 1896, is in the following words: "An inspector appointed under this section may require the production of all or any of the books and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer such oath accordingly." Sect. 17 of the Act under consideration also provides by sub-s. 2 that "on himself holding such an inspection" (i.e., an inspection under sub-s. 1 of the same section) "or on receiving the report of an inspector so appointed the Commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein and in particular may in the case of a society award that the society be dissolved and its affairs wound up, and in the case of a company may present a petition to the court for the winding up of the company." Sub-s. 3 empowers the Commissioner to direct "that all or any of the expenses of and incidental or preliminary to an inspection under this section shall be defrayed out of the funds of the society or company"—or by certain persons, subject only to a right of appeal, with the leave of the Court, to the Courts specified in the sub-section. Sect. 43 provides that the Commissioner may, subject to the approval of the Treasury, make regulations for prescribing anything which under the Act is to be prescribed, and for imposing fees, and generally for carrying the Act into effect. This section also directs that all regulations so made shall be laid before both Houses of Parliament, so that opportunity may be given for the annulment of such regulations. Sect. 45, sub-s. 2, provides that, "where under this Act the Commissioner awards that a collecting society be dissolved and its affairs wound up, the award shall be made in the like manner and have the like consequences as if it were an award made under section eighty of the Friendly Societies Act, 1896, and may direct in what manner the assets are to be divided or appropriated: Provided that the society may appeal against the award to the High Court, ..."

These are, I think, the only sections of the Act which can have any possible bearing on the question I have to determine. It is, I think, plain that there is nothing in any of those sections which can be said by necessary implication to prescribe the holding of the inspection under s. 17, or any part of it, either in public or private.

In my judgment, s. 43 empowers the Commissioner to make rules applicable to the holding of an inspection under the Act, whether by himself or by an inspector appointed for the purpose, and that the only fetter on this power is the opportunity to be given to the Legislature to annul the rules when made. I think the Legislature has by necessary implication conferred on the Commissioner a discretion with regard to the manner in which an inspection is to be conducted. The Commissioner has not made any general rules with regard to the conduct of inspections. In the absence of any such rules it seems to me the Commissioner can exercise his discretion with regard to any particular inspection.

In the circumstances the only declaration I can make is that on the true construction of the Act the particular inspection may be held at the discretion of the Commissioner, either in public or in private, or partly in public and partly in private.

A. R. T.

C. A.

The company appealed. The appeal was heard on June 9, 1931.

Sir John Simon K.C., *J. H. Stamp* and *Blanco White* for the appellants. The effect of the sections of the Industrial Assurance Act, 1923, is that the inspector appointed under the Act is to go to the offices of the society and there examine the books, etc., of the society and make his report to the Commissioner. No power is given to him to summon anyone as a witness. He has no power to hold an inquiry in public. He is not a "tribunal." The proceeding before him is not a judicial proceeding in which all members of the public may be interested, but is an administrative proceeding for the benefit of certain persons.

By s. 4 of the Act of 1923 the previous law as to assurances on children's lives was altered. By s. 26 the question of transferring members from one society to another, and by s. 25 the substitution of policies were dealt with. By s. 17, which is the relevant section, provision is made for inspection of the affairs of a company or society, the only object of which is that the inspector appointed under the section by the Commissioner should make a report to him and not to the press. The powers of examination conferred on the inspector are those given by s. 76, sub-s. 5; s. 68, sub-ss. 2, 4, and s. 80, sub-s. 1, of the Friendly Societies Act, 1896. Sect. 76, sub-s. 5, of that Act is the only section which gives power to the inspector to administer an oath.

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Under the Act of 1923 the inspector's report is solely for the purpose of informing the Commissioner who may at his discretion make it public. But the Act gives no power to the inspector to prejudice the companies he has examined by disclosing information which he has obtained in the course of such examination which may operate to the prejudice of such companies and give an unfair advantage to their business rivals.

In *In re Grosvenor Hotel and West-End Ry. Terminus Hotel Co.* (1) it was held that an examination into the affairs of a joint stock company by an inspector appointed by the Board of Trade under s. 56 of the Companies Act, 1862, was not a proceeding of such a nature that prohibition would lie in respect of it either to the Board of Trade or to the inspector. That case shows that the function of an inspector is strictly limited to reporting to the person appointing him.

What the appellants here desire to know is whether the inspector has power to conduct an inquiry in public and examine witnesses. To hold such an inquiry is an invasion of private rights of the companies, and the statute must therefore be strictly construed. When so construed it is, it is submitted, limited to holding an inspection at the office of the particular society or company concerned, or at some other place not open to the public, and the inspector has no right to use the information which the statute gives him a right to obtain for one purpose and to use it for another.

Sir William Jowitt A.-G. and *Stafford Crossman* (*Sir Stafford Cripps, S.-G.* with them) for the Attorney-General. This case raises a question of considerable importance. It is of vital importance that proceedings of this nature should be held in public.

Under s. 17 of the Act of 1923 the position is not altered by the fact that the inquiry is held by the inspector and not by the Commissioner himself. By s. 44 the Commissioner has to make an annual report of his proceedings under the Act. By s. 2, sub-s. 2, anything which under the Act is required or authorized to be done by, to or before the

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(1) 76 L. T. 337.

Commissioner may be done by, to or before such person as he may appoint for the purpose. There is nothing in the Act to compel an inspector to hold an inquiry in private. The utmost publicity is an important check on the drastic powers given by the Act. The Legislature might have recognized that it was important to have the examination in public.

The question has been raised whether this was a judicial inquiry at all. If it is there are strong grounds for saying that the proceedings must be in public. If on the other hand it is merely an administration proceedings, it does not follow that it ought not to be held in public. If it is not a judicial proceedings, then the only thing is that the report of what takes place is not protected. The question whether these proceedings are judicial or administrative does not therefore touch the matter.

By s. 45, sub-s. 2, of the Act of 1923, where under the Act the Commissioner awards that a collecting society be dissolved and its affairs wound up, the award shall be made in the like manner and have the like consequences as if it were an award under s. 80 of the Friendly Societies Act, 1896, and may direct in what manner the assets are to be divided or appropriated.

In the *Grosvenor Hotel* case (1) the decision proceeded on the ground that the examination was not a judicial inquiry. It was there said that the report would bind no one and would not be evidence against any one. Here the whole essence of the case is that the report may become the basis of further proceedings which may result in the winding-up of the company.

In *Scott* v. *Scott* (2) it was held that the Court had no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency. In that case Lord Shaw condemned the practice of hearing cases in private. In the course of his speech he said (3): "This result, which is declared by the Courts below to have been legitimately reached under a free

(1) 76 L. T. 337.
(2) [1913] A. C. 417.
(3) [1913] A. C. 476.

Constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism."

There has been a series of cases in which the question has been raised whether a particular inquiry was of a judicial character so as to carry with it immunity in respect of reports of the proceedings. In *Bottomley* v. *Brougham* (1); *Dawkins* v. *Lord Rokeby* (2); *Barratt* v. *Kearns* (3); *Slack* v. *Barr* (4); *Copartnership Farms* v. *Harvey-Smith* (5) the inquiry was held to be judicial. On the other hand, in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (6); *In re Grosvenor Hotel and West-End Ry. Terminus Hotel Co.* (7); *Attwood* v. *Chapman* (8); *Collins* v. *Henry Whiteway & Co.* (9) the inquiry was held not to be judicial. These cases show the difficulty of drawing the line of demarcation.

It is submitted that the inquiry in the present case is a judicial inquiry and ought therefore to be held in public. If, however, the inquiry is administrative only the company can obtain all necessary protection against reports in the press under the law of libel.

Blanco White in reply. The inquiry is an administration inquiry to inform the mind of the Commissioner on certain facts. When he is informed he has, as a result of the inquiry, drastic powers, which it is his duty to exercise quasi-judicially, and may in the exercise of them in the case of a society award that the society shall be dissolved, or in that of a company may present a petition for its winding up.

Cur. adv. vult.

July 15. The following written judgments were delivered:

LORD HANWORTH M.R. The plaintiffs in this action are an industrial assurance company, and by a writ dated December 22, 1929, brought this action against His Majesty's

(1) [1908] 1 K. B. 584.
(2) (1875) L. R. 7 H. L. 744.
(3) [1905] 1 K. B. 504.
(4) (1918) 82 J. P. 91.
(5) [1918] 2 K. B. 405.
(6) [1892] 1 Q. B. 431.
(7) 76 L. T. 337.
(8) [1914] 3 K. B. 275.
(9) [1927] 2 K. B. 378.

Attorney-General for a declaration that an inspector appointed by the Industrial Assurance Commissioner under s. 17, sub-s. 1, of the Industrial Assurance Act, 1923, for the purpose of examining into and reporting on the affairs of the plaintiff company, is: (1.) not bound to conduct such examination in public; (2.) not entitled to conduct such examination in public; (3.) not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the sub-section or by s. 76, sub-s. 5, of the Friendly Societies Act, 1896; or otherwise to make use of such information, save for the purpose of preparing his report to the Commissioner.

The facts are not in dispute. Mr. John Fox was appointed under s. 17 of the Industrial Insurance Act, 1923, on December 7, 1929, by Sir George Stuart Robertson, the Industrial Assurance Commissioner, to be an inspector for the purpose of examining into and reporting on the affairs of the plaintiff company. On the same date the Commissioner informed the managing secretary of the plaintiff company, "that notice of the time, date, and place of the hearing, which will in the first instance be private, will be given by the inspector." Under the powers given by s. 17 and by s. 76, sub-s. 5, of the Friendly Societies Act, 1896, Mr. Fox on June 2, 1930, gave notice of his intention to hold an inquiry at Newcastle, and required a statement showing what consideration the board of the plaintiff company had given to the question of the substitution of policies, and the operation of s. 25 of the Industrial Assurance Act, 1923, and copies of all minutes, correspondence, and instructions of the staff (office and outside) on the subject. He asked whether the existing district manager had been in charge of a district since the beginning of 1923: "If he has not been in charge of the Newcastle district since that time, please also give the name and address of his predecessor or predecessors in office back to the beginning of 1923. Would you also forward a list of the agents who have served in the Newcastle district during this period, giving the date of their appointments, and, in the case of those no longer serving, resignations."

On June 19 and 20, 1930, Mr. Fox held a meeting at the Town Hall, Newcastle, for the purpose of examining on oath officers, members, agents, and servants of the plaintiffs. Mr. Fox held the meeting in public, and previously thereto gave notice thereof to the press in order that newspaper reporters might attend it. Para. 2 of the defence gives the following account of what he did at this meeting: Mr. Fox "made a statement in public addressed to the representatives of the plaintiffs who were there present for the purpose of making known to the said representatives (1.) the information which the said inspector had gained from his examination of the books and documents of the plaintiffs which were already in evidence in the proceedings mentioned in the statement of claim, and (2.) the lines upon which the said inspector proposed to conduct his oral examination of witnesses." Then Mr. Fox proceeded publicly and in the presence of the reporters to examine on oath officers, members, agents and servants of the plaintiffs and others touching the affairs of the plaintiffs.

The plaintiffs raised very serious objections to the making of a preliminary statement by the inspector which received wide publicity, and also to the jurisdiction of the inspector to hold the inspection in public. They claimed that this statement was made before the facts were ascertained, and that conclusions were drawn and comments made in it which were not justified by the evidence subsequently called. They said that in consequence there appeared in the press statements which were defamatory of the company and calculated to discredit it and do serious injury. They urged that many of the ex-servants were not parties to the proceedings and had no knowledge of them, and that "the Legislature never intended to give an inspector power to cause unfortunate ex-officials to be pilloried in public and in the press." They asked that nothing should be done by the inspector in the future to give unnecessary publicity to the proceedings of the inquiry, and that "nothing will be done to induce the press to run the possible risk of publishing matter which may be defamatory under the mistaken belief that the proceedings are of a judicial character." In the correspondence which followed, the plaintiffs claimed that the functions of the inspector were confined to the making of a report to the Commissioner in reference to the information that he obtained, but the inspector replied that he was of opinion that it was in the interest of the policy owners that the inspection should be held in public, and that it is undesirable on general grounds that the evidence should be taken in private. Finally, on December 4 Mr. Fox informed the plaintiffs that he intended to proceed with his examination into the affairs of the plaintiff company upon the basis that the inquiry is a judicial proceeding and as such must be held in public, and in consequence the writ was issued on December 22, 1930.

The learned judge has held, in reference to the first declaration asked for, that an "inspection" under s. 17, sub-s. 1, of the Act may be held at the discretion of the Commissioner either in public or private, or partly in public and partly in private, and from that judgment the plaintiffs now appeal. The learned judge reached his conclusion because he held that the inspector authorized by the section was a "tribunal"; and in his judgment "the Court has no jurisdiction to determine how a tribunal set up under the provisions of an Act of Parliament for a particular purpose shall conduct its proceedings, except in so far as such determination involves the construction of the Act in question."

There is no reason to differ from that principle, if the inspector appointed under s. 17 is a "tribunal" to "hear and determine"—to use the old phrase—matters submitted to him. If the inspector is appointed to hear and determine some matter or issue inter partes, and if the hearing is a judicial proceeding, in the sense that it is the discharge of duties exercisable by a judge or justice in Court, I would be unwilling, even if I could, to differ from the principle laid down in *Scott* v. *Scott* (1), and particularly emphasized by Lord Shaw in his speech (2) in that case, where he forcibly adduces Bentham and Hallam as authorities in favour of the principle that judicial proceedings should be conducted with as much publicity as possible.

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(1) [1913] A. C. 417.
(2) [1913] A. C. 477.

A number of proceedings have been held to be of a judicial nature carrying with it immunity in respect of reports of the proceedings. For instance, it was decided in *Allbutt* v. *General Council of Medical Education and Registration* (1) that an inquiry by the General Medical Council into the so-called infamous conduct of a medical practitioner was a judicial proceeding, for the Council were charged with the duty of forming a judgment on the matter specially entrusted to them, and, in the course of that inquiry, of going into the allegations made, and the defence offered to them. So also, in *Bottomley* v. *Brougham* (2) it was decided that the report of an official receiver made to the Court under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, was absolutely protected, for it was made as the initial stage of proceedings in the winding-up Court, which clearly was a Court. Many other instances could be cited of similar cases in which steps in the course of judicial proceedings are entitled absolutely to the protection of privilege. For instance, in *Usill* v. *Hales* (3) the preliminary and ex parte proceedings before a magistrate were held to be protected similarly to the main proceedings of which they formed the commencement. But these decisions do not assist the present questions which we have to determine—namely, what is the nature of the inquiry that the inspector is called upon to make, and is it such that the inspector can insist upon holding his inquiry in public ?

In *Barratt* v. *Kearns* (4) the nature of a Commission issued by the bishop of a diocese under the Pluralities Act, 1838, and the Pluralities Acts Amendment Act, 1885, to inquire into the inadequate performance of the ecclesiastical duties of any benefice, was considered in relation to a claim of privilege pleaded as a defence to an action for slander. It was decided that the Commission set up was a judicial tribunal to which absolute privilege attached. The Commission

(1) (1889) 23 Q. B. D. 400.
(2) [1908] 1 K. B. 584.
(3) (1878) 3 C. P. D. 319, 326.
(4) [1905] 1 K. B. 504.

directed the persons named in it to inquire "into the facts of the case." But the nature of the functions of the Commissioners was not left in doubt. For under s. 6 of the Amending Act, it is provided "on an inquiry under any such commission as aforesaid, it shall be lawful for the bishop or any two or more of the Commissioners to require the attendance of such witnesses and the production of such documents, evidences, and writings as may be necessary on either side." That made it plain that it was the duty of the Commissioners to hear evidence on both sides and then to report. Collins M.R. in his judgment, explaining how far the doctrine of immunity has been carried to all kinds of Courts of justice, refers to *Dawkins* v. *Lord Rokeby* (1), in which the doctrine was extended to a military Court of inquiry. Such a Court is constituted under s. 72 of the Army Act, 1881, and is to inquire in the prescribed manner—that is, as laid down in the Rules of Procedure—"on oath or solemn declaration (which such Court is hereby authorised to administer)" into the matters over which it is given cognizance. By the Rules of Procedure, 1899, r. 124 (F), whenever any inquiry affects the character or military reputation of an officer or soldier, "full opportunity must be afforded to the officer or soldier of being present throughout the inquiry, and of making any statement, or of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation, and procuring any witnesses in defence of his character or military reputation." Further, by r. 125 (D): "The Court of inquiry will examine all witnesses who may be desirous of coming forward on behalf of the absentee . . . . and will give full weight to the evidence of all such witnesses." It will be seen, therefore, that in both these cases of a Commission issued by a bishop and of a military Court of inquiry, abundant precautions are taken that the procedure is to be such as provides an opportunity for both sides to be heard, and their evidence fully considered. There is no difficulty in attaching a judicial character to such tribunals.

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(1) L. R. 8 Q. B. 255; L. R. 7 H. L. 744.

But is there any corresponding duty or characteristic attached to the duties of the inspector appointed under s. 17 that we are considering? There is no issue to be tried, merely information to be gathered and laid before the Commissioner, or used by the latter in later proceedings. The inspector is armed with the powers given by sub-s. 5 of s. 76 of the Friendly Societies Act, 1896, whereby he can require production of the books and documents, and may examine on oath the officers, members, agents and servants of the society or company, and may administer the necessary oaths. He is not given the powers under sub-s. 6 whereby directions can be given at what time and place a special meeting under the section is to be held, and what matters are to be discussed and determined at that meeting.

Some other sections of the Act of 1896 may be noticed usefully. Under s. 68, a dispute may be determined by the chief or other registrar to whom it is referred: and under sub-s. 3 such registrar is to "hear and determine" the dispute; and under sub-s. 4 to administer oaths and to require the attendance of all parties concerned, and of witnesses, and the production of all books and documents relating to the matter in question. Under s. 80, upon an application, properly supported, the chief registrar may by himself, or by an assistant registrar, or another whom he is empowered to appoint, investigate the affairs of the society or branch, and for that purpose he is given by sub-s. 4—that is by a cross-reference to s. 68—the same powers and authorities as in the case of a dispute to which I have already referred. This power of investigation so given with all the powers and authority necessary for hearing and determining a dispute, might have been conferred on the inspector under s. 17 of the Act of 1923, but the only power in fact given him is to require the production of books and documents and to examine on oath and administer oaths. Nowhere are the rights of the persons whose conduct may be inquired into safeguarded. Nowhere are they given a right to tender evidence, or to require the inspector to hear matters placed before him by them. There are no provisions such as have been referred to in the case of the Commission and the Court of inquiry. From this contrast it would appear that the inspector is only equipped to seek and obtain information which is required at an early stage of the Commissioner's activity. After it has been obtained, then the Commissioner can advise himself whether he will "issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein": see s. 17, sub-s. 2. The inspector is dealing with a preliminary which is antecedent to, and not a part of, any action which the Commissioner may eventually take.

These considerations lead me to the opinion that the proceeding of the inspector is not judicial, in the sense above quoted—that is, a process of reaching a conclusion on a question which is to be heard and determined by those that sit for the purpose. I find myself in accord with the reasoning and conclusions of Horridge J. in *Collins* v. *Henry Whiteway & Co.* (1), where he held that a communication to a Court of Referees under the Unemployment Insurance Act, 1920, s. 11, was not absolutely privileged. Their duties were administrative: it was not a body deciding between parties. He held that their duties were such as are described by Lopes L.J. in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2), and judicial only to the extent that in respect of them "it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration"; but not judicial in the sense that "a hearing in a Court is judicial."

The conclusion so far reached still leaves for consideration the question whether in the exercise of his discretion the inspector was entitled to admit the public to his proceedings, and to make public what his examination revealed. Such a step was of grave importance, for the witnesses were not protected absolutely in what evidence they gave as they would have been in a Court which afforded absolute privilege to its proceedings. The purpose of absolute privilege has

(1) [1927] 2 K. B. 378.

(2) [1892] 1 Q. B. 431, 452.

often been stated: "If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue." This rule "was established not for the benefit of witnesses, but for that of the public and the advancement of the administration of justice, to prevent witnesses from being deterred by the fear of having actions brought against them from coming forward and testifying to the truth." These two passages are taken from the judgments of Sir Alexander Cockburn C.J. and Amphlett L.J. in *Seaman* v. *Netherclift.* (1) They give succinctly and cogently the reasons why complete immunity is given to those who take their part in judicial proceedings; but correspondingly they show how far proceedings to which such immunity does not attach may offer dangers to the witnesses and place them at the mercy of those about whom they have given evidence who themselves are not present. The decision as to the publicity of the hearing must be based on some public ground—on the benefit to be derived by the public generally, such as the advancement of the administration of justice, and not determined by the discretion—it might be the caprice—of an officer not specially trained to determine what course should be followed. It is certain that in the converse case if the hearing is by a judicial officer, he could not decide that the hearing should be in private. On this point some observations by Lord Haldane in his speech in *Scott* v. *Scott* (2) are relevant: "Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place

(1) (1876) 2 C. P. D. 53, 56, 62.
(2) [1913] A. C. 417, 435.

in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge." It is the public weal that is to rule.

The objection to the publication of ex parte statements before the accused or incriminated have an opportunity of answering them has long been recognized. In 1811, in *Rex* v. *Fisher* (1), it was held by Lord Ellenborough that it was libellous to publish the preliminary examinations taken ex parte before a magistrate previous to committing a man for trial or holding him to bail for an offence with which he is charged: the necessary tendency of such a publication being to prejudice the minds of the jurymen against the accused and to deprive him of an impartial trial. In 1824, in *Duncan* v. *Thwaites* (2), the question of the publication of preliminary proceedings was reviewed before the Court of King's Bench, and in delivering the judgment of the Court Abbott C.J. said (3): "This Court has on more than one occasion within a few years been called upon to express its opinion judicially on the publication of preliminary and ex parte proceedings, and has on every occasion delivered its judgment against the legality of such proceedings." In 1850, Maule J. excepted the publication of ex parte proceedings from those which are justifiable: *Hoare* v. *Silverlock*. (4) It is true that this exception no longer prevails. Wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that jurisdiction, and the rule that the publication of a fair and accurate report of proceedings taking place in a Court of justice is privileged extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge terminating in the discharge by a magistrate of the party charged. (See *Lewis* v. *Levy* (5) and *Usill* v. *Hales*. (6))

(1) (1811) 2 Camp. 563.
(2) (1824) 3 B. & C. 556.
(3) Ibid. 583.
(4) (1850) 9 C. B. 20, 23.
(5) (1858) E. B. & E. 537.
(6) 3 C. P. D. 319, 326.

But these cases show that the recognition of the advantage to the public as overriding personal and private disadvantage in the matter of the publicity of preliminary proceedings was slowly evolved.

The rule and its limits were authoritatively stated by Lord Esher in *Kimber* v. *Press Association* (1) where he said: "The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged. Under certain circumstances that publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret. The common law, on the ground of public policy, recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion. That being so, does the present case come within the rule which I have stated?" He was there considering proceedings for perjury ex parte before a magistrate, and the Court held them to be privileged as a part of judicial proceedings.

But is it possible that an inspector, appointed under s. 17 for the purpose of making a report to the Commissioner who appointed him, can at his own discretion, by his own will and insistence, place those who are involved in his inquiries in a painful, and it may be an humiliating, position when he is not a properly constituted judicial tribunal within Lord Esher's definition? The inspector is charged to make an inquiry and no more. The Commissioner will have to take the information thus produced into consideration with a view to deciding what further is to be done. The inspector, apart from the unfairness to persons not present, is more likely to obtain information and to elicit truth if he accepts what is told and given to him in strict confidence than he is if he places his informants in peril in respect of the communications they make to him. There is no power given to him explicitly to override the natural reluctance of witnesses to reveal their evidence in public and at their own risk, and I cannot find in the sections which I have examined any implied authority to that effect. I cannot hold that the advantage of the public requires this publicity. In my judgment, when once it is determined that the proceedings of the inspector are not judicial, it follows that on public grounds the wisdom of holding the inquiry in public ceases to apply, and the device of the communications being confidential becomes the better course for obtaining the end in view. If consent of all parties had been obtained the position would have been different, but I find no warrant in the Act or section, and no reason based on the principles of law and justice, by which the inspector can assume to himself the power to hold his inquiry in public against the will of those who are deeply concerned in the mode in which the information desired from them is to be given and in the absence of others interested.

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(1) [1893] 1 Q. B. 65, 68.

In my judgment the plaintiffs are entitled to succeed in their action, with costs, and to have the three declarations that they ask for made by the Court, but, as my colleagues take a different view, the appeal will be dismissed with costs.

LAWRENCE L.J. The question on this appeal is whether the power conferred by s. 17 of the Industrial Assurance Act, 1923, upon the Industrial Assurance Commissioner (or an inspector appointed by him for the purpose) to examine into and report on the affairs of an industrial assurance company is confined to holding such an inspection behind closed doors, or whether it extends to holding such an inspection at a place open to the public.

By s. 2, sub-s. 2, of the Act, anything which under the Act is required or authorized to be done by the Commissioner may be done by such person as he may appoint for the purpose; therefore, no distinction can be drawn between an inspection held by an inspector and an inspection held by the Commissioner himself. It appears from s. 17, sub-s. 2, that when an inspection is held by an inspector his duty is to report the result of it to the Commissioner. The present case, however, is not concerned with the question whether such a report is privileged, but solely with the question whether the inspection can lawfully be held in public. No regulations have been made by the Commissioner under s. 43 for prescribing the method of holding an inspection under s. 17, but that fact is immaterial for the decision of the present case, as the contention of the appellants, if well founded, necessarily involved the consequence that any regulations directing or sanctioning a public inspection would be ultra vires and void.

The main argument addressed to us on behalf of the appellants was that as s. 17 authorizes the invasion of the private rights of collecting societies and industrial assurance companies, it ought to be construed strictly, and when so construed is limited to holding an inspection at the office of the particular society or company concerned, or at some other place not open to the public. In support of that argument, the appellants submitted that the inspection was not a judicial inquiry, and consequently that the principle laid down by the House of Lords in *Scott* v. *Scott* (1) had no application. There is much force in this argument, but in my judgment it ought not to prevail.

In the first place, the affairs of collecting societies and industrial assurance companies are not private affairs in the ordinary sense. Industrial assurance business has long since been treated by the Legislature as a business which in the public interest should be strictly regulated. In particular, the amount of insurance permitted on the lives and for the funeral expenses of young children has engaged the attention of the Legislature for many years, and Parliament has imposed a strict limit on the amount of such insurances. The contention that the provisions of s. 17 constitute an invasion of any private rights is therefore not well founded. It is a matter of public concern that all collecting societies and industrial assurance companies should conduct their business in accordance with the Acts passed for the purpose of

(1) [1913] A. C. 417.

regulating such business, and it must be remembered that under the section it is only when, in the opinion of the responsible officer appointed by the Legislature, there is reasonable cause to believe that an offence against the relevant Acts has been or is likely to be committed that he is empowered to examine into the affairs of the society or company concerned.

In the second place, it is, in my judgment, unnecessary to determine whether the inspection authorized by s. 17 is a judicial inquiry or not. If it were a judicial inquiry there would no doubt be a prima facie presumption that the inspection ought to be held in public, but in my opinion the converse does not hold good. Moreover, even in the case of judicial inquiries it does not necessarily follow that they ought to be held in public; instances are to be found where judicial inquiries have been properly conducted behind closed doors, such as, for instance, ecclesiastical inquiries under the Pluralities Acts: *Barratt* v. *Kearns* (1); military inquiries under the Army Acts: *Dawkins* v. *Lord Rokeby* (2); and inquiries under the Medical Act: *Allbutt* v. *General Council of Medical Education and Registration.* (3) I know of no case in which it has been held that because an inquiry is non-judicial it ought not to be held in public.

The main distinction between the two classes of inquiries is that in the case of judicial inquiries prohibition will lie and statements made thereat are absolutely privileged, with the result that all persons properly taking part in such inquiries are immune from attack in respect of defamatory statements made by them, even though such statements may have been made maliciously and with knowledge that they were untrue; whereas in the case of non-judicial inquiries prohibition does not lie (see *In re Grosvenor and West-End Ry. Terminus Hotel Co.* (4)), and statements made by persons properly taking part in such inquiries are not absolutely privileged but are only protected by the ordinary law of privilege. (See *Collins* v. *Henry Whiteway & Co.* (5))

(1) [1905] 1 K. B. 504.
(2) L. R. 8 Q. B. 255; L. R. 7 H. L. 744.
(3) 23 Q. B. D. 400.
(4) 76 L. T. 337.
(5) [1927] 2 K. B. 378.

The question whether statements made at an inspection under s. 17 are or are not absolutely privileged does not, however, determine the question whether the inspection may or may not be held in public. Statements made at a non-judicial inquiry are not absolutely privileged, whether the inquiry be held in public or in private, whilst statements made at a judicial inquiry are absolutely privileged, both when the inquiry is held in public and when it is held in private.

In my opinion, there is a good deal to be said for the contention of the Attorney-General that an inspection under s. 17 is in the nature of a judicial inquiry, as the Commissioner is empowered as the result of it to award that a collecting society be dissolved and its affairs wound up, and to present a petition to the Court for the winding up of an assurance company, and is further empowered to direct that the costs of the inspection shall be paid out of the funds of the society or company or by the officers or former officers or members or former members of the committee of management or board of directors of the society or company, and a right of appeal to the High Court from an award dissolving a society and from a direction as to costs is given to the society or company or persons affected; but whether the inspection be a judicial inquiry or not (a question upon which I express no concluded opinion), I think there is much to be said in favour of the practice which we are told by the Attorney-General has been adopted by the Commissioner ever since the Act was passed of holding these inspections in public. The complaint made by the appellants that unnecessary pain and humiliation may be caused to ex-servants of the company by their examination and cross-examination in public does not ring true, bearing in mind that neither the Commissioner nor the inspector has (so far as I can see) any power to compel the attendance of any person at the inspection nor to compel any person who does attend to answer any question which he would rather not answer. The more serious objection, no doubt, is that urged by Sir John Simon —namely, that a public examination into the affairs of the company might prejudicially affect its business. On the other hand, the Commissioner, if he has just cause to hold (or to appoint an inspector to hold) an inspection under this section, may well come to the conclusion that to hold the inspection behind closed doors and as the result of such a private inspection to make an award dissolving the society, or to present a petition for a winding-up order against the company, without the policy-holders and other members of the public concerned having had an opportunity of hearing or being informed of what had transpired at the inspection, would not be fair to them or to the society or company.

Under s. 17 the Commissioner, or other authorized person holding the inspection, has the power to examine on oath the officers, members, agents, and servants of the society or company in relation to its business (see s. 76, sub-s. 5, of the Friendly Societies Act, 1896), and the Commissioner may reasonably take the view that any person so examined and any other person who is invited to assist at the inspection would be less likely to make malicious or wilfully untrue statements if the inspection were held in public than would be the case if it were held behind closed doors, and that thus a public inspection would be more likely to lead to the ascertainment of the true facts.

However that may be, the Court is not, in my judgment, concerned with the expediency or otherwise of holding the inspection in public or in private; that is a matter for the Legislature.

A judge of a Court of justice in England (save in a few exceptional cases) has no discretion whether he will sit in private or in public (see *Scott* v. *Scott* (1)), but I know of no principle of law which compels a Commissioner or inspector under the Act of 1923 to sit in private, or which precludes him from sitting in public if he should be so minded. The Act does not expressly state that the inspection is to be held in private, and I am unable to find any implied prohibition against holding a public inspection. In these circumstances I cannot see what jurisdiction the Court has to declare that

(1) [1913] A. C. 417.

the inspection must be held in private, or to restrain the Commissioner or an inspector appointed by him for that purpose from holding the inspection in public.

In the result I have come to the conclusion (although not without considerable hesitation in view of the contrary conclusion reached by the Master of the Rolls) that Luxmoore J. was right in deciding that under the Act it is open to the Commissioner to hold the inspection either in public or in private, or partly in public and partly in private.

In my opinion, therefore, the appeal should be dismissed.

ROMER L.J. The questions that have to be determined upon this appeal are questions of general application in relation to the examination of the affairs of a collecting society or an industrial assurance company under the powers conferred upon the Industrial Assurance Commissioner by s. 17 of the Industrial Assurance Act, 1923. We are not called upon to deal with the particular examination conducted by Mr. Fox into the affairs of the appellant company, or to express any opinion as to the observations made by him at the Town Hall, Newcastle, in relation to that company, or to decide whether in respect of those observations the company has any redress. All that we have to decide is, as it seems to me, the proper construction to be placed upon the Act in question and the legal consequences that result from the Act when so construed.

The important matter that has to be considered is whether an inspector appointed by the Industrial Commissioner is entitled to conduct the examination in public. Luxmoore J., after considering all relevant sections of the Act, came to the conclusion that there was nothing that in terms or by necessary implication either prescribed or prohibited an examination in public. If he was right in this conclusion, it would seem to be in the discretion of the inspector whether an examination should be held in public or in private, for where an Act of Parliament provides for the holding of an examination but does not in terms or by necessary implication provide that it shall not be held in public, I do not know of any rule of law that compels the person who conducts the examination to do so in private.

That there is nothing in the Act that in terms directs the examination to be held in private or prohibits it from being held in public is conceded, and for myself I have been unable to discover any such direction given by necessary implication. On the other hand, I can see reasons why in some cases, at any rate, it would be desirable in the interests both of the society or company and of the public that the examination should not be held behind closed doors. It is reasonably plain that the object of the examination is to enable the Commissioner to inform himself whether an offence against any of the three Acts mentioned in s. 17, sub-s. 1, has or has not been committed. Having so informed himself by an examination or by a report of the inspector, the Commissioner may exercise the powers conferred upon him by sub-s. 2. He may "issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed." It is not necessary on this appeal to consider what limits, if any, are to be assigned to these words, which in terms at any rate seem to confer powers of an autocratic nature, without, in most cases, any right of appeal. But even the powers that are particularly conferred by the sub-section may have serious consequences. In the case of a society he may award that it shall be wound up, and in the case of a company may present a petition to the Court for its winding-up. In the former case a right of appeal to the Court is given by s. 45, sub-s. 2, and in the latter case it is the Court itself that will deal with the petition. But the award or the presentation of the petition may do the society or the company considerable harm, and in some cases, at any rate, it might be very much to the benefit both of those interested in the society or company as of the public at large that an examination that may result in the exercise by the Commissioner of such far-reaching powers should be conducted in as open a manner as possible. Nor have I been able to find anything in s. 76, sub-s. 5, of the Friendly Societies Act, 1896, that suggests a private rather than a public examination. It is true that that sub-section does not in terms confer a power of compelling the attendance of persons to be examined on oath, whereas such a power is conferred by s. 68, sub-s. 4, of that Act in connection with disputes referred to the Chief Registrar. But even assuming that the Commissioner has not, by reason of this, any such power, it does not throw any light upon the question whether he may hold his examination in public if he can persuade the witnesses to attend. It was urged that the powers conferred by s. 17 are in any case a serious encroachment upon private rights, and should be construed so as to render that encroachment as small as possible. It is, however, a section that was obviously enacted for the benefit and protection of the public, and it would seem to be in the interests of the public that the examination should not be conducted behind closed doors even in cases in which it may be in the interests of the society or company in question that it should. It was, indeed, suggested by the Attorney-General that the Commissioner is bound to have the examination held in public upon the principles enunciated by the House of Lords in *Scott* v. *Scott* (1), and our attention was particularly directed to the observations made by Lord Shaw in the course of his speech in that case. But I am not aware that the principle in question has ever been applied except to Courts of justice properly so called. It certainly has never been applied, so far as I know, to proceedings before those tribunals that in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2), were designated by Fry L.J. as " Courts in law." Those are certain tribunals which, not being Courts of justice, have, nevertheless, such similar attributes to Courts of justice that persons appearing before them can claim absolute privilege in respect of statements made in the course of the proceedings. Instances of such tribunals are to be found in *Barratt* v. *Kearns* (3); *Dawkins* v. *Lord Rokeby* (4); and *Copartnership Farms* v. *Harvey-Smith.* (5) But in those three cases the proceedings before the tribunals were, so far as I can judge, held in private, and the public were, or might have been, excluded. Whether the proceedings before the Commissioner or his deputy could properly be regarded as proceedings before a Court in law so as to confer absolute privilege need not therefore be decided upon this appeal, for the decision could throw no light upon the question whether those proceedings should be held in public or in private. The Commissioner is not, at any rate, a Court of Justice, and he is not therefore, in my opinion, compelled to hold his examination in public. But, after giving the matter my best consideration, I have been unable to find any adequate reason for holding that he is compelled to hold it in private.

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(1) [1913] A. C. 417.
(2) [1892] 1 Q. B. 431.
(3) [1905] 1 K. B. 504.
(4) L. R. 8 Q. B. 255.
(5) [1918] 2 K. B. 405.

For these reasons, though in view of the fact that the Master of the Rolls has come to another conclusion I say it with much diffidence, I am of opinion that the decision of Luxmoore J. was right, and that this appeal should be dismissed.

I only desire to add this: The learned judge did not in terms deal with the third declaration sought by the plaintiffs in their statement of claim. He, no doubt, regarded it, as I think it was intended to be regarded, as being merely ancillary to the preceding declaration. On this footing, inasmuch as I agree with him that the plaintiffs are not entitled to the second declaration asked for, it follows that they are not entitled to the third.

Appeal dismissed.

Solicitors for appellants: *Kingsley Wood, Williams & Co.*
Solicitor for respondent: *Treasury Solicitor.*

W. I. C.

FARWELL J.
1931
June 26, 29, 30;
July 1.

NEWS OF THE WORLD, LIMITED v. ALLEN FAIRHEAD AND SONS, LIMITED.

[1931. M. 797.]

Light and Air—Ancient Light—Alteration of Dominant Tenement—Diminution of Ancient-Light Area—Increase of Burden on Servient Tenement—Subsequent Obstruction—Measure of Nuisance.

An owner of ancient light cannot so diminish his ancient-light area as to increase the burden on the servient tenement.

The observations of Lord Lindley in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179, 210 to the effect that in considering whether a proposed obstruction would amount to a nuisance, non-ancient light from other quarters of which the dominant owner might be deprived at any time ought not to be taken into account were not intended to interfere with this paramount principle.

If, therefore, the dominant tenement is rebuilt in such a way that the area of coincidence between an old and new window is much smaller than the old window, so that the ancient-light area is greatly diminished, the dominant owner cannot ask the Court to measure the nuisance (if any) by treating the rest of the new window, rendered obstructible by his own act, as blocked up.

Tapling v. *Jones* (1865) 11 H. L. C. 290; *Higgins* v. *Betts* [1905] 2 Ch. 210, 215, and *Ankerson* v. *Connelly* [1906] 2 Ch. 544, 548 discussed.

WITNESS ACTION.

The plaintiffs were the lessees in occupation of 67 Fleet Street and 1, 2 and 3 Whitefriars Street for a term of 94¼ years from March 25, 1925. The defendants were the owners of 68 Fleet Street and 41 Whitefriars Street opposite the plaintiffs' premises.

Before the alterations next mentioned the plaintiffs' windows were entitled to a right of light over the defendants' premises.

Towards the end of 1925 the plaintiffs' premises were pulled down and a new building erected with numerous windows fronting on the defendants' building. A plan was prepared to obtain the district surveyor's licence, but no proper survey plan accurately showing the partial coincidences between the old and new windows was produced, and it was quite clear that the plaintiffs' architect never had the question of preserving the ancient lights in his

FARWELL J.

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NEWS OF THE WORLD, LD. v. ALLEN, FAIRHEAD & SONS LD.

mind at all. Partial coincidences were almost inevitable, but these were not the result of any intention on the part of the plaintiffs or their architect to preserve their ancient lights, but purely fortuitous.

After the plaintiffs' new building was finished, the defendants demolished their own old premises and began to erect new buildings on their site, designed to be of a much greater height than their old premises.

On May 1, 1931, the plaintiffs being apprehensive that their light would be obstructed commenced this action for an injunction, damages and costs.

The defendants said that the plaintiffs' ancient lights, if any, had been abandoned, and that in any case they had not made out any case of nuisance.

Swords K.C. and *Guest Mathews* for the plaintiffs. The plaintiffs' alterations do not amount to abandonment: *Scott* v. *Pape* (1); *Tapling* v. *Jones* (2); *Andrews* v. *Waite* (3); *Ankerson* v. *Connelly* (4); *Bailey and Son* v. *Holborn & Frascati.* (5)

As to partial coincidence of the old and new windows our evidence is defective above the ground floor, but on that floor we have proved that substantial pencils of ancient light must pass through some of the present ground floor windows.

In considering whether the proposed obstruction will be a nuisance the Court must disregard everything but the window section of those ancient light pencils. In other words it must treat the remainder of each window as blocked up and decide whether the obstruction of the window in that state would be a nuisance: *Colls* v. *Home and Colonial Stores* (6); *Tapling* v. *Jones* (2); Gale on Easements, 10th ed., pp. 473–476.

Sir Herbert Cunliffe K.C. and *W. E. Vernon* for the defendants. The plaintiff's complete lack of intention to preserve the ancient lights on rebuilding raises a presumption of abandonment. The small undesigned coincidences do not displace that presumption.

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(1) (1886) 31 Ch. D. 554.

(2) 11 H. L. C. 290.

(3) [1907] 2 Ch. 500, 509.

(4) [1907] 1 Ch. 678, 681, 683.

(5) [1914] 1 Ch. 598, 602.

(6) [1904] A. C. 179, 210.

As to the question of nuisance. Lord Lindley undoubtedly said in the *Colls* case (1) that light from other quarters could not be disregarded but that non-ancient—i.e., obstructible light—ought not to be taken into account. But he cannot have meant his remarks to apply to a case where the obstructibility was due to the dominant owner's own acts, as that would enable him greatly to increase the burden of the easement. Nor does *Tapling* v. *Jones* (2) justify any such view. On the increase of burden point see *Ankerson* v. *Connelly* (3); *Bailey and Son* v. *Holborn & Frascati* (4); *Frechette* v. *St. Hyacinthe* (5); and Gale on Easements, p. 477.

Swords K.C. replied.

FARWELL J. [after stating the facts] held that the mere lack of evidence of any intention to preserve the ancient lights was not by itself sufficient to prove an intention to abandon them, even though the amount of coincidence between the old and new windows was comparatively very small. But the lack of precise evidence of the identity of the ancient and non-ancient lights rendered it impossible to hold that there was any retention of light above the ground floor. On the ground floor, however, there were undoubtedly substantial coincidences between certain new apertures and the old windows, and the plaintiffs still had a right to ancient lights in regard to those particular apertures. His Lordship continued: That being so, I have to consider whether the defendants' new building will obstruct the plaintiffs' ancient light to a sufficient extent to cause a nuisance.

In *Higgins* v. *Betts* (6) Farwell J. said: "The test of nuisance is not—How much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had? but—How much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind ?" But in applying this test, how am I to ascertain whether there is a nuisance or not ?

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(1) [1904] A. C. 179, 210.

(2) 11 H. L. C. 290.

(3) [1906] 2 Ch. 544, 548; [1907] 1 Ch. 678, 682.

(4) [1914] 1 Ch. 598, 602.

(5) (1883) 9 App. Cas. 170, 185, 186.

(6) [1905] 2 Ch. 210, 215.

The plaintiffs say that the right way is to treat the windows as only consisting of the portion through which the ancient light passes and to treat the remaining portion as blocked up. I am, then, to ascertain whether the obstruction to the window so treated is such as to cause a nuisance.

They rely on *Colls* v. *Home and Colonial Stores* (1), where Lord Lindley said: "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James V.-C. in the *Dyers' Co.* v. *King* (2), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account."

The plaintiffs say that in applying that principle, in order to see whether there is a nuisance, I must exclude all light except that passing through those portions of the new apertures which correspond with the old. They say that *Tapling* v. *Jones* (3) is to the same effect.

If that is so, I am bound to give effect to those decisions, but I cannot accept the view either that *Tapling* v. *Jones* (3) decided anything of the kind, or that Lord Lindley ever intended to suggest that it did.

In *Tapling* v. *Jones* (3) there was no question of what, if any, portion of ancient lights survived the demolition of an old building. The plaintiff had added to his ancient lights. Then came the obstruction. Before action the plaintiff made his building conform again to what it was before and then claimed in respect of his previous lights. In other words, there was no alteration of the building as a

(1) [1904] A. C. 179, 210.
(2) (1870) L. R. 9 Eq. 438.
(3) 11 H. L. C. 290.

whole. There was an increase of the means of access of light, which was altered before action by reinstating the building in its old condition, and the question really determined was that that alteration and reinstatement did not amount to abandonment.

I, of course, accept Lord Lindley's statement, but I accept it in full, and not in part. He is clearly speaking of light to which a right has not been acquired and of which the plaintiff can be deprived at any time.

I can well understand that if a man has a room lighted, both by ancient lights and non-ancient lights, obstructible by outsiders, then, if an obstruction is threatened to the ancient lights, the Court cannot say to the plaintiff, "you are at present getting enough light from the other windows to prevent this obstruction being a nuisance, and therefore you cannot complain" since the result might be that if the obstructible windows were subsequently blocked the plaintiff might be left with a room wholly unsuitable for ordinary occupation.

But on the other hand it cannot be right that anything the plaintiff himself does should increase the burden on the servient tenement, and I cannot believe that the learned Lords in *Tapling* v. *Jones* (1) or Lord Lindley in the *Colls* case (2) ever contemplated that a plaintiff could pull down his old building and put up a new building totally different in every respect, except for some slight coincidences in the old and new window spaces, and then say to the Court, "Treat all my present light facilities as blocked out, leaving me nothing but a comparatively small peephole of ancient light, and then give me relief because that very inadequate amount of ancient light space will be made more inadequate by the defendants' proposed acts." If that were the law, the plaintiff by his own acts would have greatly increased the burden on the servient tenement.

The true view is this. If the plaintiff pulls down the building with ancient light windows and erects a new building totally different in every respect, but having windows to

(1) 11 H. L. C. 290.

(2) [1904] A. C. 210.

some extent in the same position as the old windows, he cannot require the servient owners to do more than see that the ancient lights, if any, to which he is still entitled are not obstructed to the point of nuisance. He cannot require them not to obstruct non-ancient light merely because a portion of the window through which that non-ancient light enters his premises, also admits a pencil of ancient light. If the obstruction of the pencil itself causes a nuisance the plaintiff is entitled to relief, but if taking the building as it stands the pencil obstruction causes no nuisance at all, the plaintiff is not entitled to relief.

In *Ankerson* v. *Connelly* (1) the servient owner asked for a declaration that having regard to the dominant owner's alterations he had no easement of light.

Warrington J. came to the conclusion that the burden on the servient tenement had been increased and that the servient owner was entitled to relief. He said: "Now is it possible [so to] sever that increased burden as to preserve to the [dominant owner] that to which he was entitled, and to impose upon the servient tenement that obligation only which was previously imposed upon it, without the obligation attempted to be imposed upon it by the alterations? In a case like this it seems to me absolutely impossible. It seems to me that it is beyond human ingenuity to say what may be done by the owner of the servient tenement on his land which would not be a nuisance to so much of the old light as still passed through the new windows under the existing altered circumstances brought about by the [dominant owner] himself."

Here, also, it really is impossible, especially having regard to the great uncertainty as to the exact dimensions of the windows and lights to determine the result of the threatened obstruction, having regard to the way the plaintiffs have built their new building without preserving any evidence as to the identity of the ancient windows. But, whichever way it is put, I am satisfied that the plaintiffs have failed in this case to establish any nuisance.

(1) [1906] 2 Ch. 544, 548; [1907] 1 Ch. 678.

[His Lordship then dealt with the expert evidence and held that the obstruction to the ancient light pencil alone would have no appreciable effect on the present building as it stood, the difference being so small as to be negligible. It was not possible to obstruct the new lights without obstructing that ancient pencil, and it was not possible in this case to treat the pencil as something by itself. If the ground floor windows had all been ancient lights, there would have been a serious diminution of light in one room, and to that extent the obstruction might have been a nuisance. But the damage would not have been very serious, and would only have justified small damages and not an injunction. If, on the other hand, the ancient light pencil were now the only source of light, the ground floor rooms would have been extremely badly lighted even before the defendants' obstruction. With that obstruction they would be slightly more badly lighted, but the plaintiffs could not say to the defendants: "Owing to our own fault we have got very dark rooms and you are not entitled to make them darker, though if we had not ourselves darkened them your obstruction would have caused no nuisance at all." That would clearly be increasing the burden on the servient tenement, and the argument was therefore untenable.]

The result is that the plaintiffs have not proved any nuisance and the action must be dismissed with costs.

Solicitors: *Oswald Hickson, Collier & Co.; Cardew Smith & Ross.*

G. R. A.

LATCHFORD PREMIER CINEMA, LIMITED *v.* ENNION.

BENNETT J.

1931
July 23.

[1931. L. 3357.]

Company—Articles of Association—Provision that Office of Director should ipso facto be vacated if by Notice in Writing to the Company he resigned his Office—Oral Resignation by Directors—Acceptance by the Company—Resignation valid.

A company's articles of association provided that the office of a director should ipso facto be vacated if by notice in writing to the company he resigned his office. Two of the directors orally tendered their resignations at the annual general meeting of the company and their resignations were accepted by the meeting:—

Held, that the resignations of the two directors were valid.

THIS was a motion by the plaintiff company for an injunction to restrain the defendants from acting or purporting to act as directors of the company. The defendants had for some time been directors of the company. At the annual general meeting of the company held on February 10, 1931, the defendants orally tendered their resignations as directors and their resignations were accepted by the meeting. On February 12, 1931, and on subsequent dates the defendants attended meetings of the board of directors of the company, claiming the right to be present and to take part in the deliberations of the directors on the ground that article 34 of the company's articles of association required the resignation of directors to be by notice in writing. Article 34 provided that the office of a director should ipso facto be vacated if he became bankrupt . . . . or if by notice in writing to the company he resigned his office.

Alexander Grant K.C. and *P. Vos* for the plaintiff company. When a director of a company tenders his resignation at a meeting of the company and his resignation is accepted, he ipso facto ceases to be a director. He cannot withdraw his resignation without the consent of the company: *Glossop* v. *Glossop*. (1) Under article 34 the defendants automatically vacated their office of directors on tendering their resignations:

(1) [1907] 2 Ch. 370.

In re The Bodega Co., Ld. (1) Notwithstanding the provisions of article 34 for the formal determination of the contract by a notice in writing, the parties can informally agree to put an end to the contract without the observance of that formality: *Morris* v. *Baron & Co.* (2)

Ackroyd for the defendants. The terms under which a director holds office are to be ascertained from the articles of association: *Glossop* v. *Glossop.* (3) The company, as employer, is also bound by the articles of association. That point has not been touched upon in the argument put forward on behalf of the company. The company in general meeting cannot ignore its own articles. So long as an article governs the resignation of a director the whole contract is contained in that article, and a director can only resign in the manner prescribed by it: *Barlow* v. *Vestry of St. Mary Abbotts, Kensington.* (4)

BENNETT J. This is a motion in an action of the plaintiff company for an injunction to restrain the defendants from acting or purporting to act as directors of the plaintiff company, and for judgment in the action till further order.

The answer given on behalf of the defendants to the motion is that the resignation by word of mouth, and the acceptance by resolution is inoperative, because article 34 requires, before a director shall cease to be a director, that he shall give a notice in writing to the company that he resigns. In my judgment the answer based on article 34 is not a good one. I see no reason in law why the contract of service between the company and its directors should not be terminated by the same means as that by which the contract of service between two individuals may be terminated, and I see no ground in law for saying that where a written contract has been made for service which requires a written notice on either side before it can be terminated, it cannot be terminated by word of mouth by mutual agreement between the parties. That is all that has happened in this case, and

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(1) [1904] 1 Ch. 276.
(2) [1918] A. C. 1.
(3) [1907] 2 Ch. 370, 375.
(4) (1886) 11 App. Cas. 257, 266.

BENNETT J.

1931

LATCHFORD PREMIER CINEMA, LD. v. ENNION.

in my judgment the offices of the defendants were vacated when, on February 10, 1931, they verbally offered to resign, and their offers were accepted by the resolution of the company. Accordingly there should, in my judgment, be an injunction in the terms of the notice of motion.

Solicitors for company: *William Charles Crocker, for Wood, Lord & Co., Manchester.*

Solicitors for defendants: *Lewis & Dunkerley, Warrington.*

P. J. B.

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Parkin v. *Knight* (1846) 15 L. J. (Ch.) 209 followed and applied.

In re Clerke [1915] 2 Ch. 301 and *In re Whitehead* [1920] 1 Ch. 298 distinguished. *In re* HAYDEN. PASK *v.* PERRY **Luxmoore J. 333**

2. —— *Gift of Residue to named Persons in equal Shares—Settlement of single Share—Lapse—"Share to which A. T. shall become entitled"—Intestacy as to Share.*

Stewart v. *Jones* (1859) 3 De G. & J. 532 followed.

In re Pinhorne [1894] 2 Ch. 276 distinguished. *In re* TAYLOR. TAYLOR *v.* TAYLOR - - - - - - **Eve J. 237**

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